87-609

Supreme Court, U.S.
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No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE OF MISSOURI,

Appellee.

On Appeal From The Supreme Court Of Missouri

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the State of Missouri may authorize, and through St. Louis County, a political subdivision thereof, impose, consistently with the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3, or the Due Process Clause, U.S. CONST. amend. XIV, § 1, county sales and county transportation sales taxes upon the sales of aviation fuel by Appellant Shell Oil Company, an out-of-state seller,

   (a) when Shell maintains no facilities or personnel in St. Louis County, or anywhere else in the State of Missouri, in any way related to the sale or delivery of the fuel, and when the only incidents of the sales occurring in St. Louis County are the delivery of the fuel by third-party carriers and the technical passage of title to the fuel, or

   (b) when Shell's only contact with St. Louis County is through third-party carriers who are responsible solely for delivery of the fuel to the purchasers or their agent.

2. Whether the State of Missouri may authorize, and through St. Louis County, a political subdivision thereof, impose, consistently with the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3, or the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, county sales and county transportation sales taxes upon the sales of aviation fuel by Shell, an out-of-state seller whose participating places of business are located outside Missouri, when a seller who maintains a participating place of business in Missouri, but outside of St. Louis County, would not be subject to those taxes.

STATEMENT OF CORPORATE AFFILIATIONS

Shell Oil Company owns all of the stock of Shell Energy Resources, Inc., which owns all of the stock of Pecten International Company, Scallop Coal Corporation, Shell Offshore, Inc., Shell Mining Company, and Shell Western E&P, Inc. All of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60% by Royal Dutch Petroleum Company and 40% by Shell Transport and Trading Company, a Public Limited Company in London, U.K. The following companies are affiliated with Shell Oil Company, or one of the affiliates named above, but are not wholly-owned subsidiaries: Fractionation Research, Inc; Gravcap, Inc.; Heat Transfer Research, Inc; Inland Corporation; LOOP, Inc.; MESBIC Financial Corporation of Houston; Oil Companies Institute for Marine Pollution Compensation Limited; Oil Insurance Limited; Seadock, Inc.; Pecten Cameroon Company; Thums Long Beach Company; East Texas Salt Water Disposal Company; Wyoming Industrial Development Corporation; Lucky Chance Mining Company, Inc.; George Neuman and Company; and United Scientific, Inc.

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On Appeal From The Supreme Court Of Missouri

JURISDICTIONAL STATEMENT

Shell Oil Company appeals from the June 16, 1987, judgment of the Supreme Court of Missouri holding that imposition of St. Louis County, Missouri, sales and transportation sales taxes against Shell pursuant to Mo. Rev. Stat. §§ 66.600-.635 and 94.600-.655 (1978 & Cum. Supp. 1984)[1] is permissible under the Commerce Clause, U.S.

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[1] The current version of Missouri statutes is the 1986 statutory revision. Citations herein are to the 1978 revision and its 1984 cumulative supplement. Some of the cited sections were amended during the assessment period involved, but the pertinent portions were unaffected by the amendments. Additionally, some of those sections were in force prior to the 1978 revision but were unchanged during the revision, and for ease of reference citation has thus been made to the 1978 revision.

CONST. Art. I, § 8, cl. 3, or the Due Process Clause, U.S. CONST. amend. XIV, § 1.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, p. 1a, *infra*, is reported at 732 S.W.2d 178 (Mo. 1987) (en banc). It is also unofficially reported at 2 [Mo.] ST. TAX REP. (CCH) ¶ 201-084 (June 16, 1987).

The Statement of the Case, Findings of Fact, Conclusions of Law and Decision of the Missouri Administrative Hearing Commission, p. 14a, *infra*, is not officially reported. It is unofficially reported at 2 [Mo.] ST. TAX REP. (CCH) ¶ 201-013 (Mar. 31, 1986).

JURISDICTION

The opinion and judgment of the Supreme Court of Missouri, affirming the decision of the Missouri Administrative Hearing Commission, and upholding the constitutionality of the imposition of St. Louis County, Missouri, sales and transportation sales taxes, were entered June 16, 1987. *See* pp. 1a, 25a, *infra*. Shell's Motion For Rehearing was overruled on July 14, 1987. *See* p. 26a, *infra*.

Shell's Notice of Appeal to this Court was timely filed in the Supreme Court of Missouri on September 22, 1987. *See* p. 27a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

Because of their length, the text of the following constitutional provisions, statutes, ordinances, and regulations is set forth in the Appendix, as provided in Rule 15.1(f):

(A) U.S. Const. Art. I, § 8, cl. 3 (Commerce Clause) (p. 30a).

(B) U.S. Const. amend. XIV, § 1 (Due Process and Equal Protection Clauses) (p. 30a).

(C) Mo. Rev. Stat. § 66.600 (1978) (p. 30a).

(D) Mo. Rev. Stat. § 66.605 (1978) (p. 30a).

(E) Mo. Rev. Stat. § 66.615 (1978 & Cum. Supp. 1984) (p. 31a).

(F) Mo. Rev. Stat. § 94.600 (1978) (p. 32a).

(G) Mo. Rev. Stat. § 94.605 (1978) (p. 33a).

(H) Mo. Rev. Stat. § 94.610 (1978) (p. 33a).

(I) Mo. Rev. Stat. § 94.620 (1978 & Cum. Supp. 1984) (p. 34a).

(J) Mo. Rev. Stat. § 144.020 (1978 & Cum. Supp. 1984) (p. 34a).

(K) Mo. Rev. Stat. § 144.021 (1978) (p. 34a).

(L) Mo. Rev. Stat. § 144.080 (1978 & Cum. Supp. 1984) (p. 35a).

(M) St. Louis County, Mo., Ordinance No. 6792 (June 28, 1973) (p. 35a).

(N) St. Louis County, Mo., Ordinance No. 8378 (Sept. 13, 1977) (p. 36a).

(O) 12 C.S.R. 10-5.545 (1977) (p. 36a).

(P) 12 C.S.R. 10-5.550 (1977) (p. 37a).

STATEMENT OF THE CASE

Shell brought the proceedings below to appeal the assessment of St. Louis County, Missouri, sales and transportation sales taxes on its sales of aviation fuel to

airlines serving Lambert-St. Louis International Airport. Shell asserted, *inter alia*, that imposition of the taxes violated the Commerce Clause and Due Process Clause of the United States Constitution. Shell's claims were ultimately rejected by the Supreme Court of Missouri, and this appeal followed.

1. Shell's Sales Activities.

Shell is a Delaware corporation with its principal place of business in Houston, Texas. It contracts with airlines serving Lambert-St. Louis International Airport (the "Airport"), which is located in St. Louis County, Missouri, for the sale of aviation fuel. The contracts are accepted and executed by Shell at its Houston office and include an estimated annual gallonage of aviation fuel to be purchased by each respective airline. These contracts govern the *sale* of the aviation fuel.

Shell, however, maintains no facilities or personnel in St. Louis County related to the sales in question. The stipulation of facts below specifically stated that

> "Shell maintains no sales office, administrative office, store, warehouse or other similar facility at the Airport, or anywhere else in the State of Missouri, which in any way participates in the *sale or delivery* of the aviation fuel in question to the respective airlines at the Airport." (Emphasis added.)

Shell has certain fuel "exchange agreements" with Amoco Oil Company that allow Shell to sell and deliver the fuel via pipeline to the Airport from the Amoco Oil Company refinery in Wood River, Illinois. The exchange agreements are accepted by Amoco Oil Company at its office in Chicago, Illinois, and by Shell at its office in Houston.

The pipeline between the refinery in Illinois and the Airport is owned by St. Louis Pipeline Company and is

operated by Amoco Pipeline Company. Shell has no equity or other ownership interest in Amoco Oil Company, St. Louis Pipeline Company, or Amoco Pipeline Company.

Fuel is delivered through St. Louis Pipeline Company's pipeline to storage tanks owned, operated, and maintained by Allied Aviation Fueling Company of St. Louis, Inc. ("Allied"), which operates a storage tank and fuel distribution system at the Airport and, pursuant to contracts with the airlines, renders a fueling service to airlines serving the Airport. Allied receives fuel from other suppliers as well as Shell. The airlines compensate Allied directly for its services. Shell makes no remuneration to Allied, and Shell has no contractual relationship whatsoever with it. Nor does Shell have any economic or proprietary interest in Allied.

The entire operation involving *delivery* of fuel from Wood River, Illinois, to the Airport is controlled by *Allied's* employees. Pursuant to instructions from the airlines, Allied's employees decide when to request delivery of fuel, the quantity to be delivered, and to which airline the fuel is to be delivered, and they control the commencement and termination of the deliveries.

The fuel delivered through the pipeline to Allied's facilities is measured through two Amoco Oil Company fuel meters. The first is located at the refinery and measures the amount of fuel that enters the pipeline. The second is located adjacent to Allied's facilities at the Airport. This meter is "read" by Allied's employees. Allied's employees record the quantity of fuel delivered into storage, tender the meter ticket to the airline customer, and send a copy of the ticket to Shell at its Chicago Administrative Complex in Oak Brook, Illinois. Personnel at Shell's Chicago

Administrative Complex bill the airlines. As a result of Shell's fuel exchange agreements with Amoco Oil Company, and Shell's contracts with the airlines, title to the fuel passes simultaneously from Amoco Oil Company to Shell to the airlines when it flows through the meter at the Airport and is delivered into Allied's storage facilities.

2. The Taxes At Issue.

Missouri has authorized certain counties, including St. Louis County, to impose by ordinance a general countywide sales tax "for the benefit of both the incorporated and the unincorporated areas of the county[.]" MO. REV. STAT. § 66.600.1 (1978). It has also authorized certain cities and counties, including St. Louis County, to impose by ordinance a sales tax for "transportation purposes," *id.* § 94.605.1, which include financial support for public mass transit; construction, repair, and maintenance of streets, roads, and bridges; and the acquisition of lands and rights-of-way, *id.* § 94.600(9).[2] St. Louis County has imposed both sales taxes. St. Louis County, Mo., Ordinance No. 8378 (Sept. 13, 1977); *id.* No. 6792 (June 28,

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[2] The general definition of "transportation purposes" also includes "the construction, reconstruction, repair and maintenance of airports owned and operated by municipalities," the "acquisition of lands and rights-of-way for . . . airports," and "planning and feasibility studies for . . . airports." MO. REV. STAT. § 94.600(9) (1978). For "first class counties operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants," however, the list of "transportation purposes" specifically excludes all references to airports. *Id.* St. Louis County is the only Missouri county that falls within that classification. *See* STATE OF MISSOURI, 1981-1982 OFFICIAL MANUAL 1180, 1197-1205. Hence the transportation sales taxes at issue here may not be used for Airport purposes. MO. REV. STAT. § 94.645.1 (1978 & Cum. Supp. 1984).

1973). Missouri has never authorized imposition of local compensating use taxes, however, and thus St. Louis County has no such taxes.

The sales and transportation sales taxes, insofar as is pertinent here, are identical. The taxes may be imposed upon the retail sale of tangible personal property or taxable services if the property and services are subject to sales taxation by the State itself. *Id.* §§ 66.600.2, 94.605.4. All applicable provisions of the State sales tax law apply, except as modified by the local tax statutes themselves. *Id.* §§ 66.615.1(1), 94.620.1(1) (1978 & Cum. Supp. 1984). Thus, like the State sales tax, *see id.* §§ 144.020-.021, .080, the taxes are imposed upon the seller for the privilege of engaging in the business of selling goods and services at retail. *Id.* §§ 66.605, 94.610 (1978). While the seller must collect the tax from the purchaser, his inability to do so does not relieve him of the obligation to pay the tax. *See id.* § 144.080.4 (1978 & Cum. Supp. 1984).

The State statutes permitting local sales taxes modify the State sales tax scheme, however, with respect to determination of the situs of the sale. The enabling statutes provide that all retail sales, except those destined for delivery outside Missouri, "shall be deemed to be consummated at the place of business of the retailer." *Id.* §§ 66.615.5, 94.620.5. If a retailer has more than one place of business in Missouri that participates in the sale, the sale is "deemed to be consummated at the place of business of the retailer where the initial order" is taken. *Id.* Appellee's own regulations, which define "place of business" in terms closely paralleling the stipulation, provide that the presumption is conclusive and that the points of delivery and passage of title are therefore irrelevant in

determining the situs of the sale. 12 C.S.R. 10-5.545(1)-(2), .550(1) (1977).[3]

3. The Proceedings Below

Appellee assessed Shell for St. Louis County sales and transportation sales taxes and interest of $103,009.53 for the period from March 1, 1978, through February 28, 1981.[4] Shell filed a timely complaint with the Missouri Administrative Hearing Commission, seeking a determination that the assessment should be set aside. The parties waived a formal hearing and consented to a decision based on a Stipulation of Facts and the briefs filed by each party.

Shell asserted, *inter alia*, that it was not liable for the taxes because it did not maintain a place of business in St. Louis County, as required by the applicable statutes and regulations. Shell also asserted that imposition of the local sales taxes violated the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3, and the Due Process Clause, U.S. CONST. amend. XIV, § 1, of the United States Constitution. Since Shell had collected and remitted use taxes due the State, that amount was never in dispute.

The Missouri Administrative Hearing Commission upheld imposition of the taxes, holding that the Amoco Oil Company fuel meter at the Airport constituted a place of

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[3] These regulations address the transportation sales tax. Appellee, however, has never contended that the principles contained in the transportation sales tax rules do not apply with equal force to the county sales tax, for which no regulations have been promulgated.

[4] In addition to this assessment, Shell now has pending refund claims for sales and transportation sales taxes aggregating an additional $450,227.51.

business for Shell in St. Louis County.[5] *See* p. 24a, *infra*. The Commission made no effort to address Shell's constitutional claims.

Shell then filed a Petition For Review of the Commission's decision in the Missouri Court of Appeals, Western District, raising the same points it had raised before the Commission. The Petition For Review specifically asserted the unconstitutionality of the taxes under the Commerce Clause and Due Process Clause. After hearing argument, the Court of Appeals transferred the case to the Supreme Court of Missouri on jurisdictional grounds.[6] *See* p. 13a, *infra*.

The Supreme Court of Missouri upheld imposition of the taxes by a four to three vote. *See* opinion below, p. 8a, *infra*. The court first rejected Shell's statutory argument that Shell was not liable for the taxes because it maintained no place of business in St. Louis County. The court held that in this case "the purpose of that statutory pre-

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[5] The Commission so held despite the previous holding of the Circuit Court of Cole County, Missouri, against Appellee that the same meter did not constitute a place of business for Amoco Oil Company itself. Appellee had also previously *stipulated* to a judgment in favor of Texaco, Inc., on virtually identical sales at the Kansas City, Missouri, Mid-Continent Airport. The Supreme Court of Missouri rejected Shell's argument that Appellee, who did not appeal the adverse *Amoco* decision, and who stipulated to judgment in favor of Texaco, should be estopped by those judgments to maintain a contrary position in this case. *See* p. 5a-7a, *infra*.

[6] The Court of Appeals determined that the case involved construction of the Missouri revenue laws and thus fell within the exclusive jurisdiction of the Supreme Court of Missouri. *See* Mo. Const. Art. V, § 3. Under Missouri law, an appeal is not invalidated if it is erroneously taken to the inappropriate court; it is instead transferred to the appropriate court for disposition. *See id.* § 11.

sumption is not implicated," *id.*, p. 5a, *infra*, because "[t]he obvious purpose of this provision was to fix the taxable situs of transactions which might have a nexus with more than one municipality," *id.* The court distinguished its decision in *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282 (Mo. 1978) (en banc), which had applied the "place of business" language, on the ground that in that case the sales were "possibly subject to taxation by other *local* jurisdictions." Opinion below, p. 5a, *infra* (emphasis added). Ignoring all of the out-of-state incidents of the sales here, the court said that Shell's sales "are entirely consummated in St. Louis County where, Shell, *through its agents*, delivers the aviation fuel, and passes title to the purchasers and ultimate users, the airlines with whom it has contracted." *Id.* (emphasis added). The court did not state under which of the stipulated facts it found an "agency" relationship, nor did it identify the "agents."

The court rejected Shell's Commerce Clause challenge summarily on the basis of its determination that the sales were not interstate, but instead were "intrastate in character." *Id.*, p. 7a, *infra*. According to the court,

> "Shell's assertion that the sale [sic] and Shell itself have no nexus with St. Louis County runs counter to the facts. The sale [sic] themselves are inextricably linked to St. Louis County. *Through its agent*, Shell maintains a continuing presence at Lambert Field by which it fulfills its contracts with airlines which operate there." *Id.*, p. 8a, *infra*.

The court failed to address Shell's due process challenge. In a single sentence it said that Shell's "equal protection argument fails" for reasons "similar" to those it

used to reject Appellant's Commerce Clause challenge.[7] *Id.*

The dissenters disagreed with the holding that the "place of business" presumption applies only when the retailer has more than one place of business *in Missouri* that participates in the sale, arguing that the presumption "serves to ease administration of both *intra*state and *inter*state state [sic] commerce transactions." *Id.*, p. 10a, *infra* (Donnelly, J., dissenting). The dissenters also found that imposition of the taxes "creates an unconstitutional burden on interstate commerce" because of the "apparent lack of a substantial connection with Missouri" and the consequent failure to satisfy the nexus requirement of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Opinion below, p. 12a, *infra* (Donnelly, J., dissenting).

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Supreme Court of Missouri condones an impermissible burden upon interstate commerce. Furthermore, in a transparent attempt to justify imposition of the taxes, the decision itself *creates* a flagrant discrimination against interstate commerce. The court's opinion would also make the United States Postal Service, United Parcel Service (UPS), and all other car-

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[7] The court's reference to Shell's "equal protection argument" may have been intended to refer instead to the due process attack, since Shell did not raise an equal protection challenge below. Shell's equal protection claim is advanced for the first time in this Court on the basis of the clear interpretation here by the Supreme Court of Missouri that the "place of business" presumption applies only if the retailer has more than one place of business *in Missouri* that bears some relationship to the sale transaction.

riers the "agents" for out-of-state sellers shipping goods into Missouri and would permit local taxation on the basis of that "agency," contrary to the previous decisions of this Court. Finally, the decision sanctions the denial of Shell's rights to due process of law and of equal protection of the laws.

I. THE TAXES IMPERMISSIBLY BURDEN, AND DISCRIMINATE AGAINST, INERSTATE COMMERCE.

In *Complete Auto Transit* this Court enunciated a four-part test for determining whether taxation of interstate transactions is permissible under the Commerce Clause: there must be a substantial nexus between the interstate activities and the taxing jurisdiction; the tax must be fairly apportioned; the tax must not discriminate against interstate commerce; and the tax must be fairly related to the services provided by the taxing jurisdiction. 430 U.S., at 279. The taxes at issue here fail to satisfy this test.

The opinion below contradicts numerous decisions of this Court. As a result, many pipeline fuel consumers will be burdened with taxes not otherwise due because Shell and other suppliers cannot risk future assessment for uncollected taxes. Yet the effect goes beyond Shell and its customers. Other fuel suppliers, notably Amoco and Texaco, have had the same issue before Missouri courts and administrative agencies; the opinion below may well be said to have overruled decisions favorable to them. *See* note 5, *supra*. Moreover, other state tax laws may be similar to those in issue here. Hence the opinion below will affect any number of sales to any number of buyers. The Commerce Clause question therefore is substantial.

A. There Is No Substantial Nexus Between The Aviation Fuel Sales And St. Louis County.

Appellee has stipulated that Shell conducts no activities, and has no facilities or employees, within St.

Louis County in any way connected with the fuel sales. Fuel orders are made and filled pursuant to sales contracts between Shell and the individual airlines that are executed and accepted by Shell at its Houston, Texas, office. Individual orders are placed by the *airlines'* agent, Allied, directly to an out-of-state location, the Amoco Oil Company refinery in Wood River, Illinois. The fuel is delivered from Illinois to the Airport through a pipeline that Shell does not own and in which Shell has no ownership interest. Shell bills the airlines for the fuel directly from its administrative office in Oak Brook, Illinois.

Hence it is undisputed that the only connection between the sales and St. Louis County is the delivery of the fuel by independent third parties and the technical passage of title to the fuel. The Supreme Court of Missouri clearly recognized this fact and sought to avoid nontaxation by creating an "agency" fiction.[8] Since Allied's contracts are with the airlines and Shell has no relationship whatsoever with Allied, the "agents" to which the court referred must necessarily be Amoco Oil Company, St. Louis Pipeline Company, and/or Amoco Pipeline Company.

Given the conspicuous absence of explanation, it is entirely unclear in what sense the Supreme Court of Mis-

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[8] The court stated that "consummation" of the sales "is only effected through a series of agency relationships"; that in St. Louis County "Shell, through its agents, delivers the aviation fuel, and passes title to the purchasers and ultimate users, the airlines with whom it has contracted"; that "Shell maintains a place of business, albeit through its agents, in St. Louis County"; and that "[t]hrough its agent, Shell maintains continuing presence at Lambert Field by which it fulfills its contracts with airlines which operate there." Opinion below, pp. 5a, 7a, 8a, *infra*.

souri employed the "agency" fiction. But undeniably the asserted "agents" are responsible for nothing more than transporting the fuel from the refinery in Illinois to the Airport in Missouri. This Court has long held that an out-of-state seller may not be subjected to taxation when its only contact with the taxing jurisdiction is through a third-party carrier. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 539 (1951). *See Miller Brothers* v. *Maryland*, 347 U.S. 340 (1954).

In *National Bellas Hess*, Illinois sought to require National, a catalog mail order house with its principal place of business in North Kansas City, Missouri, to collect and pay state use taxes. National had no office, distribution house, sales house, warehouse, or other place of business in Illinois, not did it have sales representatives there. Its only contacts with Illinois were via the United States mail or common carrier. 386 U.S., at 753-54. Merchandise orders were mailed to National and accepted at its Missouri plant, and the goods were then shipped to the customers. *Id.*, at 754-55. The Illinois Supreme Court rejected National's Commerce Clause challenge, and this Court reversed. The Court reasoned that it had

> "never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. . . .
>
> "In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction . . . between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business. But this basic distinction . . . is a

valid one, and we decline to obliterate it." *Id.*, at 758 (footnote omitted).

In *Norton* this Court similarly held that Illinois could not constitutionally impose upon Norton the State occupation tax, which was measured by the amount of Norton's sales to Illinois inhabitants, for that portion of Norton's income derived from sales made directly from its Massachusetts facility. 340 U.S., at 539. Like the present case, the tax in *Norton* fell on the vendor. *Id.*, at 537. The Court found that the orders filled directly from Massachusetts were "so clearly interstate in character" that Illinois could not constitutionally tax the income derived from those sales. *Id.*, at 539.

Thus, "[u]nless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not liable." *Id.*, at 537. In the present case the local incidents are only the delivery by third parties and the technical passage of title. Those incidents are insufficient to satisfy the first prong of the *Complete Auto Transit* analysis.

B. The Taxes Are Not Fairly Apportioned.

In view of this Court's recent decisions, it is plain that the taxes are not fairly apportioned. Taxes levied on interstate activities must have "internal consistency": they must "be such that, if applied by every jurisdiction," there "would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984). *See American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 107 S. Ct. 2810, 2820 (1987). Here the sales conceivably could be taxed by Texas, where Shell maintains its corporate offices and enters into the contracts with the airlines, or by Illinois,

where shipment of the fuel originates and where Shell maintains its administrative center from which it bills the airlines for the fuel. Thus Shell could be subjected to a multiple burden as a direct result of its choice to do business in interstate commerce. Such a multiple burden is clearly an "impermissible interference" with free trade. *See American Trucking*, 107 S. Ct., at 2840; *Tyler*, 107 S. Ct., at 2820.

C. The Taxes Discriminate Against Interstate Commerce.

Sections 66.615.5 and 94.620.5 and the applicable regulations provide that the sales are conclusively deemed to be consummated "at the place of business of the retailer," without regard to the point of delivery or passage of title. Facially the presumption makes no distinction between a retailer whose place of business is in Missouri and one whose place of business is outside of Missouri. As construed by the Supreme Court of Missouri here, however, the presumption operates only if the retailer has more than one place of business *in Missouri* related to the transactions.[9] Opinion below, p. 5a, *infra*.

So interpreted, the statutes and regulations flagrantly discriminate against interstate commerce. The result is clear: If Shell had a participating location in Missouri, but outside of St. Louis County, it would not be liable for the St. Louis County taxes. Since Shell's only participating locations are outside Missouri, Shell is liable for the local sales tax. St. Louis County taxes Shell solely because Shell's operations are in interstate commerce. Such a scheme flouts the "substantially evenhanded treatment

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[9] As noted above, the court rejected the dissenters' argument that the presumption applied equally to interstate and intrastate sales. *See* opinion below, p. 10a, *infra*.

demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 332 (1977).

Under this Court's "consistent course of decisions in recent years a . . . tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause." *American Trucking*, 107 S. Ct., at 2841. Thus, in *Boston Stock Exchange* the Court struck down a New York securities transactions transfer tax that imposed a higher tax on transactions involving out-of-state sales than on those involving New York sales. In *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963), the Court invalidated a Louisiana use tax that included in the tax computation the cost of labor and shop overhead for out-of-state assembly of taxable equipment but excluded those items for equipment assembled within the state. And in *American Trucking* the Court found that Pennsylvania's axle tax "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" 107 S. Ct., at 2842.[10] Central to the Court's decisions was the principle that a State may not, through discriminatory tax schemes, discourage interstate commerce by encouraging nonresident businesses to locate within the State in order to eliminate the compet-

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[10] *See also Maryland* v. *Louisiana*, 451 U.S. 725, 757 (1981), noting that the "obvious economic effect" of Louisiana's credit against severance taxes for first-use taxes paid on gas from the Outer Continental Shelf "is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States."

itive disadvantage. *Id.; Boston Stock Exchange*, 429 U.S., at 334-36; *Halliburton*, 373 U.S., at 72-73. Indeed, in *Boston Stock Exchange* the Court unanimously said that such discrimination is "virtually *per se* illegal." 425 U.S., at 336.

Clearly, therefore, application of the place of business presumption only if the retailer has more than one participating location *in Missouri* works an impermissible discrimination against interstate commerce. The construction the Supreme Court of Missouri has given the governing statutes and regulations in an attempt to justify taxation of Shell creates the type of gross inequality against which the Commerce Clause was intended to guard. The tax thus fails to satisfty the third prong of the *Complete Auto Transit* test.

D. The Taxes Are Not Fairly Related To Services Provided By St. Louis County.

Because Shell maintains no physical facilities or personnel in St. Louis County related in any way to its sales of aviation fuel, it is difficult to imagine how the taxes against Shell could be any less related to services provided by the county. St. Louis County cannot provide police or fire protection for personnel and property that do not exist. While it may provide protection for the pipeline or the Airport fuel meter, neither the pipeline nor the meter is owned, operated, or maintained by Shell; and protection for Allied's facilities is irrelevant, since the fuel in Allied's hands belongs not to Shell but to the airlines. Furthermore, in St. Louis County the transportation sales tax money may not be used for Airport purposes. *See* note 2, *supra*. Consequently, it is self-evident that the taxes are not fairly related to services provided Shell by the county and that the taxes therefore fail to satisfy the fourth prong of the *Complete Auto Transit* test.

II. THE OPINION BELOW WOULD MAKE ALL CARRIERS "AGENTS" OF OUT-OF-STATE SELLERS AND SUBJECT SUCH SELLERS TO LOCAL SALES TAXES, CONTRARY TO THE PREVIOUS DECISIONS OF THIS COURT.

The Commerce Clause question is likewise substantial because of the far-reaching consequences of the opinion below. In declaring that the companies forming the fuel delivery network are Shell's "agents" and that such "agency" is a sufficient nexus upon which to base imposition of the taxes, the Supreme Court of Missouri has rendered liable for local taxes any out-of-state seller who uses a third party carrier, such as the United States Postal Service or UPS, to deliver goods to a purchaser within Missouri. Under the court's opinion, the carrier would be the seller's "agent" and its location for any given delivery the seller's "place of business" within the taxing jurisdiction. *See* opinion below, pp. 5a, 7a, 8a, *infra;* note 8, *supra*. As discussed above, such a result is clearly contrary to this Court's decisions. *See National Bellas Hess*, 386 U.S., at 758; *Norton*, 340 U.S., at 539. Yet left unchecked it is certain to have a significant impact on commerce. The potential effect on out-of-state mail order houses doing business in Missouri would be but one example.[11]

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[11] Of the 7,433 mail order houses with payroll in the United States in 1982, the last year for which statistics are available, 7,217 were located outside Missouri. Combined, the non-Missouri mail order houses did $10,969,691,000.00 in business in 1982. The eight states bordering Missouri had 1,189 mail order houses, or 16% of the national total, and did $1,899,004,000.00 in mail order business, 17% of the national total. Illinois alone was fourth in the country in the number of mail order houses, with 348, and it was first in sales with $1,316,470,000.00. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF RETAIL TRADE, GEOGRAPHIC AREA

III. IMPOSITION OF THE TAXES DEPRIVES SHELL OF DUE PROCESS OF LAW.

The due process analysis focuses on whether the taxing jurisdiction is attempting to exact a tax beyond its jurisdictional reach. "[W]hen a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *American Oil Co.* v. *Neill*, 380 U.S. 451, 457-58 (1965) (quoting *Miller Brothers*, 347 U.S., at 344-45). The "'simple but controlling question is whether the state has given anything for which it can ask return.'" *National Bellas Hess*, 385 U.S., at 765 (quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

This test is closely related, if not virtually identical, to the first and fourth prongs of the Commerce Clause analysis. *See* Part I(A), (D), pp. 12-15, 18, *supra*. The discussion above need not be repeated here. It suffices to say that, given Shell's lack of physical presence in St. Louis County, and given that only third-part delivery and technical passage of title occur there, the nexus is insufficient to permit taxation of Shell consistent with the requirements of due process. The question is substantial for the same reasons discussed above.

SERIES—UNITED STATES, Table 4, at U.S.-37 (1984). Each of those mail order houses could be subject to local taxes under the logic of the Supreme Court of Missouri in this case.

IV. THE COUNTY SALES AND TRANSPORTATION SALES TAX STATUTES AND REGULATIONS, AS CONSTRUED BY THE SUPREME COURT OF MISSOURI, DISCRIMINATE AGAINST SHELL AND THUS DENY IT EQUAL PROTECTION OF THE LAWS.

As this Court recently stated, a "State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation." *Williams* v. *Vermont*, 472 U.S. 14, 23 (1985). That, however, is precisely what the local tax scheme here does. As the court below construed the statutes and regulations, the presumption that the sales are consummated at the place of business of the retailer operates only if the retailer has more than one place of business *in Missouri*. Since Shell operates purely in interstate commerce, it is not allowed the benefit of the presumption. If Shell had a participating place of business elsewhere in Missouri, but outside of St. Louis County, it would not be liable for St. Louis County taxes. But instead it is required to pay the taxes solely *because* it does not have a participating place of business within Missouri; its only participating places of business are located outside of Missouri.[12] The discrimination is clear. Although equal protection requires "equal treatment" for "taxpayers who can be distinguished only

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[12] Ignoring all of the interstate incidents of the sales, the Supreme Court of Missouri stated that the "sales are entirely consummated in St. Louis County." Opinion below, p. 5a, *infra*. Thus, finding the sales "to be intrastate in character," *id.*, p. 7a, *infra*, the court rejected Shell's constitutional challenges. But this Court

> "is not bound by the state court's determination that the challenged tax is not a tax on interstate commerce. 'The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not "a tax on interstate commerce."'" *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 107-08 (1975).

on the basis of residence," *id.*, at 23 n.7, Shell has "not been 'accorded equal treatment, and the inequality is not because of the slightest difference in [St. Louis County's] relation to the decisive transaction, but solely because of [Shell's] different residence,'" *id.*, at 24 (quoting *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 572 (1949)). If the Missouri courts fail to give Shell the equal treatment to which it is entitled, every other out-of-state retailer may be subjected to the same discrimination. The question, quite clearly, is substantial.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal and docket the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF MISSOURI
en banc

No. 68871

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Duplicate Of Filing On
Jun 16 1987
In Office Of
Clerk Supreme Court

APPEAL FROM THE ADMINISTRATIVE HEARING COMMISSION

Honorable Hugh A. Sprague, Commissioner

Shell Oil Company appeals the decision of the Administrative Hearing Commission, which upheld the assessment against petitioner of St. Louis County sales and transportation sales taxes by respondent Director of Revenue. Initially appellant sought review in the Missouri Court of Appeals, Western District. Because the case requires construction of the revenue laws of this state, that Court transferred the cause without opinion to this Court which has exclusive jurisdiction under Mo. Const. art. V, § 3. Affirmed.

The central issue is whether the Director's assessment should be set aside because Shell's sales of aviation fuel at the Lambert airport in St. Louis County are in some way exempt from county sales and transportation sales taxes. Shell's principal contention is that its sales are exempt because it does not maintain a place of business in St. Louis County.

The Director collects, administers, and enforces the various sales tax provisions including properly enacted county sales taxes. Sections 66.610 (authorizing the Director to collect county sales tax) and 94.615, RSMo 1986 (the same as to the county transportation sales tax). The Director assessed Shell for both St. Louis County sales taxes and interest in the total amount of $103,009.53 for the period from March 1, 1978 through February 28, 1981. As permitted under § 621.050, RSMo 1986, Shell appealed the assessment to the Commission. The parties waived a formal hearing and submitted a joint stipulation of facts as well as separate proposed findings of fact, conclusions of law and briefs. The Commission upheld the Director's assessment of the county sales taxes on Shell's sales of aviation fuel at Lambert Airport.

Upon review, the commission's decision "shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record." Section 621.193, RSMo 1986. The Commission must observe mandatory procedural safeguards and its approval of the questioned agency action must not clearly create a result "contrary to . . . the reasonable expectations of the general assembly . . . ." *Id.* As in the review of other administrative decisions, the evidence must be considered in a light most favorable to the decision, together with all reasonable inferences which support it. *See Hermel, Inc.* v. *State Tax Commission*, 564 S.W.2d 888, 894 (Mo. banc 1978). A summary of those facts which support the decision follows:

Shell, a Delaware corporation with its principal office in Houston, Texas, markets petroleum products, including aviation fuel, nationwide. At its Houston offices, Shell has entered into contracts for the sale of avaiation fuel to several airlines which operate from Lambert-St. Louis International Airport (Lambert Field) within St. Louis County. These contracts include an estimated gallonage of fuel to be sold to each airline. Shell does not itself own or operate a pipeline, fuel storage facility, or pump at Lambert. Instead, Shell has certain fuel exchange agreements with Amoco Oil Company which allows

Shell to fulfill its aviation fuel contracts there. From its Illinois refinery, Amoco delivers fuel to Lambert through a pipeline owned by St. Louis Pipeline Company but operated by yet another entity, Amoco Pipeline Company. Shell has no equity interest in Amoco, St. Louis Pipeline or Amoco Pipeline.

At Lambert field the fuel passes through a meter owned by Amoco into the storage tanks of Allied Aviation Fueling Company of St. Louis, Inc. Allied employees determine when and how much fuel will be delivered through the pipeline as well as which airline will receive delivery of the fuel. Allied employees measure the quantity of fuel received by "reading" the Amoco meter. Allied delivers a meter ticket reflecting this measurement to each airline customer and sends a copy of the meter ticket to Shell's administrative office in Oak Brook, Illinois, for billing. Allied fully controls the commencement and termination of deliveries through the pipeline and is compensated for its service by the airlines it serves. Shell neither pays Allied nor has any equity interest in or contract with Allied.

Shell's contracts with the airlines and the exchange agreements with Amoco provide that title to the aviation fuel passes from Amoco to Shell and then to the respective airlines as it passes through the Amoco meter at Lambert. Another stipulation states that "Shell has paid and no controversy exists with respect to State sales or use taxes on the sales in question, . . ." Despite the parties' failure to specify whether a state sales or state use tax was paid, the Commission concluded that Shell had paid state sales tax on the sales of aviation fuel because taxable sales had taken place in Missouri.

Shell argues that in order to be subject to these taxes it must be operating a "place of business" in St. Louis County. In this, Shell misreads the statutes and focuses improperly on a secondary question. The county sales tax imposes upon all sellers "a tax for the privilege of engaging in the business of selling tangible personal property . . . at retail to the extent and in the manner provided in [the State Sales Tax Act] and the rules and regulations of the director of revenue issued pursuant

thereto; . . ." Section 66.605, RSMo 1986. Similarly, the transportation sales tax is imposed "on the receipts from the sales at retail of all tangible personal property or taxable services at retail within the [county] . . . , if such property and services are subject to taxation by the State of Missouri under the [State Sales Tax Act]." Section 94.605.2, RSMo 1986. Therefore, the threshhold question is whether any transaction constitutes a sale at retail as defined in Section 144.010, RSMo 1986. This statute has been slightly altered since this case arose but is unchanged in any significant or relevant respect. If and only if the transaction is subject to state sales tax may the county sales taxes apply.

A sale at retail is defined as "any transfer made by any person . . . of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; . . . ." Section 144.010(8). The attribute then which is determinative of whether a transaction is a taxable sale for purpose of the Missouri sales tax is the transfer of title or ownership. *Kurtz Concrete, Inc.* v. *Spradling*, 560 S.W.2d 858, 860 (Mo. banc 1978). Transfer of "[t]itle to goods cannot pass under a contract for sale prior to their identification to the contract . . . ." Section 400.2-401(1) (the Uniform Commercial Code). Subsection 2 continues:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, . . . (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but (b) if the contract requires delivery at destination, title passes on tender there."

The stipulated facts do not detail Shell's exchange agreement with Amoco or its contracts with the airlines except for one salient fact. Title passes at the Amoco meter from Amoco to Shell and then to the airlines. Consequently, Shell's denial of ownership control of the pipline or any airport operation is

unavailing as to the controlling question of whether this constitutes a sale. For purpose of the state taxing statutes, there is a sale at retail even, as here, if its consummation is only effected through a series of agency relationships.

Most of Shell's argument about a "place of business" is misdirected. Although the sales tax statutes, *see* §§ 66.615.5 and 94.620, RSMo 1986 (using identical language) and the regulations of the Director, *see* 12 CSR 10-5.545 and 10-5.050, provide that "all retail sales shall be deemed to be consummated at the place of business of the retailer," the purpose of that statutory presumption is not implicated. "The obvious purpose of this provision was to fix the taxable situs of transactions which might have a nexus with more than one municipality." *Fabick and Compay* v. *Schaffner*, 492 S.W.2d 737, 745 (Mo. banc 1973). Both of the statutes in question emphasize this purpose by additionally providing that when a retailer has more than one place of business in Missouri a sale is deemed to be consummated where the initial order is taken. No such choice is necessary here. These sales are entirely consummated in St. Louis County where, Shell, through its agents, delivers the aviation fuel, and passes title to the purchasers and ultimate users, the airlines with whom it has contracted.

Shell relies on *Mobil-Teria Catering Company, Inc.* v. *Spradling*, 576 S.W.2d 282 (Mo. banc 1978) in its argument but that case is distinguishable. In *Mobil-Teria*, the dispute was whether the questioned sales occured in the context of a place of business inside or outside the limits of Kansas City, the taxing jurisdiction. *Id.* at 284. In that case, all indicia of the questioned sales occurred outside Kansas City. While possibly subject to taxation by other local jurisdictions, the extraterritorial sales therefore could not be subject to Kansas City's local sales taxes. *Id.* This conflict is not presented in the instant case since all significant aspects of the sales occur at Lambert Field which is entirely subject to the taxing jurisdiction, St. Louis County.

Citing *Oates* v. *Safeco Insurance Company of America*, 583 S.W.2d 713 (Mo. banc 1979), Shell next contends that previous

litigation on nearly identical facts should support a collateral estoppel against the Director. In a circuit court case, the same metering device considered here was the focus of "a place of business" discussion. In another, the petitioner, *Texaco, Inc.*, had an arrangement virtually identical to the one that Shell has in the instant case except that the avaiation fuel was delivered at Kansas City Mid-Continent Airport through an intermediary's pipeline crossing from Kansas to Missouri. The Director of Revenue entered into a joint order of dismissal with the petitioner in that case which abandoned the Director's assessment. These cases are substantially similar on their facts to the present case.

Shell points to *Drainage District No. 1 Reformed* v. *Matthews*, 361 Mo. 286, 234 S.W.2d 567 (Mo. 1950) in support of its contention that a governmental entity can be bound by collateral estoppel. However, the *Matthews* court grounded its holding on the doctrine of virtual representation and found that the parties to the two suits were essentially identical. *See id.* at 303-04, 234 S.W.2d at 574. Still, Shell argues that the test wherein a stranger to a prior suit may benefit from the use of collateral estoppel against a party to the former suit has been met. *See Oates*, 583 S.W.2d at 719 (setting out a four-part test).

Nonetheless, this Court must decline the requested application of estoppel. The circuit court case and the joint order of dismissal before the Commission do not bind this Court. Importantly, the "incidence of taxation is determined by law" and the Director may not "vary the force of statutes." *Lynn* v. *Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985); *St. Louis Country Club* v. *Administrative Hearing Commission*, 657 S.W.2d 614, 616 (Mo. banc 1983). The Director's previous acts whether declining to appeal an adverse decision or whether consenting to an adverse dismissal order "cannot bind future directors of the Department nor limit the state's right to collect taxes properly owing." *Lynn*, 689 S.W.d at 49. Sound policy suggests that estoppel should rarely be applied to a governmental entity and then only to avoid a manifest injustice. *Cf. id.* at 48 (discussing why equitable estoppel

should not apply against the Director). Moreover, "a change of position with respect to a pure matter of law ordinarily will not work an estoppel, particularly when the earlier position has been found unsound or untenable." *Kansas City* v. *Martin*, 391 S.W.2d 608, 616 (Mo.App. 1965). The Director's prior positions whether by judgment or consent may not form the basis of an estoppel against him.

Shell correctly asserts that only sales subject to the state sales tax are subject to the county sales taxes. However, it incorrectly argues that its sales are exempt because Section 144.030.1 exempts from application of the sales tax "such sales as may be made in commerce between this state and any other state of the United States." A tax exemption provision is to be construed strictly against the party who claims the exemption. *Farm & Home Savings Association* v. *Spradling*, 538 S.W.2d 313, 317 (Mo. 1976). Based on the foregoing, Shell maintains a place of business, albeit through its agents, in St. Louis County. At this location, sales are initiated and consummated. It is the delivery of the aviation fuel which triggers Shell's right to payment, and triggers the airlines' duty to pay. The contract signed in Houston is no more than an agreement regarding such future sales. Shell has not demonstrated its right to this exemption.

Finally, citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), *reh'g. denied*, 430 U.S. 976, Shell raises a commerce clause argument. Section 144.030.1 exempts from sales tax "any retail sale which the state of Missouri is prohibited from taxing under the Constitution or law of the United States of America." Consistent with its own view of the facts, Shell argues that the local sales taxes fail to meet the four-part test for determining whether local taxation of interstate sales impermissibly burdens interstate commerce. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

Since this Court has found the sale to be intrastate in character, this challenge evaporates. The interstate character of Shell and its far-flung corporate activities do not themselves

"present an insuperable barrier to local regulation nor impose an undue burden upon interstate commerce." *See Lynn*, 689 S.W.2d at 47. When there is a substantial nexus with the taxing state, the Commerce Clause does not absolutely forbid local regulation of interstate commerce. *Id.* Shell's assertion that the sale and Shell itself have no nexus with St. Louis County runs counter to the facts. The sale themselves are inextricably linked to St. Louis County. Through its agent, Shell maintains a continuing presence at Lambert Field by which it fulfills its contracts with airlines which operate there. Shell's sales are subject to the Missouri state sales tax and consequently they are subject to the county sales taxes which incorporate the statutory limitations of the state sales tax. Shell's equal protection argument fails for similar reasons.

The Administrative Hearing Commission decision is supported by competent and substantial evidence and is affirmed.

WILLIAM H. BILLINGS, Judge

Higgins, C.J., Blackmar and Rendlen, J.J., concur; Donnelly, J., dissents in separate opinion filed; Welliver and Robertson, JJ., dissent and concur in dissenting opinion of Donnelly, J.

SUPREME COURT OF MISSOURI
en banc

No. 68871

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Duplicate Of Filing On
Jun 16 1987
In Office Of
Clerk Supreme Court

DISSENTING OPINION

As a general rule, St. Louis County is permitted to impose a sales tax and a transportation sales tax within the parameters of the state sales tax law. *See*, Sections 66.605 and 94.605.2, RSMo 1986. Implicit in these provisions is a requirement that there be a sale at retail. In addition, it is presumed that all such retail sales will "be consummated at the place of business of the retailer." Sections 66.615.5 and 94.620.5, RSMo 1986. The statutes are silent as to the meaning of the term "place of business." For purposes of determining the situs of the taxable sale, the question then is whether Shell Oil Company's "place of business" is in Houston, Texas, or at the meter site located at Lambert Airport.

The Director of Revenue urges that Shell Oil Company's "place of business" is at the location of the meter site where fuel passes from the pipeline into storage facilities at Lambert Airport. This assertion is based primarily on the stipulated fact that title to the fuel passes at this meter site.

I must disagree. This Court has held that the point of delivery or point of passage of title is irrelevant in determining

where a "place of business" is located. *Fabick & Co.* v. *Schaffner*, 492 S.W.2d 737 (Mo. 1973). In *Fabick*, a seller of heavy equipment sought a declaratory judgment that sought to preclude imposition of the Jefferson City municipal sales tax to its business transactions. Fabick's salesmen solicited sales of the equipment from customers both within and outside Jefferson City. The sales purchase orders were then accepted by Fabick at its office in Jefferson City. Upon approval of the sales, the equipment was delivered to its customers by Fabick: (1) from its office in Jefferson City to another point in Missouri; or (2) from a point outside of Jefferson City to another point in Missouri; or (3) from outside of Missouri to a point in Missouri, either within or beyond the limits of Jefferson City. *Id.* at 739.

In upholding the assessment of the sales tax to all of the transactions, with the exception of those to out-of-state customers, this Court explained that:

> The obvious purpose of [the "place of business"] provision was to fix the taxable situs of transactions which might have a nexus with more than one municipality. A staggering administrative problem would be created if each sale were subjected to scrutiny as to the exact point of passage of title. The General Assembly intended to avoid such difficulty by determining in advance the situs of the taxable event.

Id. at 745. Although *Fabick* is factually distinguishable from the present case, the concept that the location of passage of title is irrelevant remains a viable principle. It serves to ease administration of both *intra*state and *inter*state state commerce transactions.

Further support for this interpretation is found in the Director's own regulations. *See*, 12 CSR 10-5.050 and 10-5.545. It is stated therein that for purposes of both the sales tax and transportation sales tax, "all retail sales are conclusively presumed to have been consummated at the place of business of the seller/retailer without regard to the location or point of passage of title. . . . The sale is consummated at the seller's location, not at the point of delivery."

An example of the rule's application is regard to deliveries from outside of the State of Missouri is found in 12 CSR 10-5.070(1)(B). It reads as follows:

> Example: Ms. Stone, a Mo. purchaser located in Sun City, has a mail order catalog from Rock Company, a vendor located outside the state of Mo., with no office, property or salesmen in Mo. Ms. Stone sends an order in the mail to Rock Company for merchandise to be delivered to her place of business by common carrier. Ms. Stone is subject to the Mo. use tax if the merchandise is for storage, use or consumption. The sale is not subject to city sales tax.[1]

Here, the airlines have contracted to purchase fuel from Shell Oil Company, a supplier located in Houston, Texas with no office, property or salesmen in Missouri. The purchase arrangement includes an estimated annual gallonage to be sold. As a part of an "exchange agreement" between Shell Oil Company and Amoco Oil Company, the fuel is delivered via a pipeline and metering equipment owned and/or operated by Amoco Oil Company from an Illinois refinery to the purchasers at their places of business in St. Louis. In my view, the sale is not subject either to a local sales tax or to a transportation sales tax.

These facts also give rise to a legitimate claim that imposition of such taxes creates an unconstitutional burden upon interstate commerce. Under the *Complete Auto Transit*[2] test, a tax can only be sustained against a Commerce Clause challenge if the tax is assessed on an activity with a "substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 276., 97 S.Ct. at 1079.

The parties have stipulated that:

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[1] An identical example is found in 12 CSR 10-5.560(1)(B) for applying the transportation sales tax. It concludes that "[t]he sale is not subject to transportation sales tax."

[2] *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

> Shell maintains no sales office, store, warehouse or other similar facility at the Airport, or anywhere else in the State of Missouri, which in any way participates in the sale or delivery of the aviation fuel in question to the respective airlines at the Airport.

In addition, the fuel orders are placed by the airlines through their agent, Allied Aviation, directly to the Amoco refinery in Illinois pursuant to the sales contracts entered into between Shell and the airlines in Houston, Texas. The fuel is then delivered by means of a pipeline between two meter sites which are located in different states. The fuel is thus measured when it enters the pipeline at Wood River, Illinois, and when it leaves the pipeline for storage in tanks at Lambert Airport. None of the described equipment or facilities are owned or operated by Shell Oil Company.

There is an apparent lack of a substantial connection with Missouri on the facts in this case. They fail to satisfy the nexus test of *Complete Auto Transit. See, e.g., National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967) (cannot impose state use tax on out-of-state seller when only connection with customers in taxing jurisdiction is delivery of the goods by common carrier or the United States mail); *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340 (1954) (Delaware corporation cannot be burdened with Maryland use tax where its only connection with Maryland customers was delivery of the goods and general advertising in Maryland); and *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534 (1951) (Illinois gross receipts tax sustained on Massachusetts corporation with office in Illinois as to all sales to Illinois customers except on those orders sent directly to and delivered from the head office in Massachusetts).

The Administrative Hearing Commission's decision is not supported by competent and substantial evidence of a taxable event, and consequently creates an unconstitutional burden on interstate commerce.

I respectfully dissent.

Robert T. Donnelly, Judge

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 38,295

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

ORDER

NOW ON THIS DAY the Court considers the Brief filed by Appellant in the above-styled cause and, being fully advised in the premises, the Court determines that this cause is within the exclusive jurisdiction of the Missouri Supreme Court pursuant to Article V, § 3 of the Constitution of Missouri because issues raised by Appellant involve the construction of the revenue laws of the State of Missouri,

NOW THEREFORE IT IS ORDERED that the above-styled cause be and is hereby transferred to the Missouri Supreme Court pursuant to Article V, § 11 of the Missouri Constitution.

Dated this 21st day of November, 1986.

/s/

Donald B. Clark, Chief Judge

cc: Mr. Thomas F. Simon, Clerk
Mr. David Clyde Agee
Mr. Richard L. Wieler

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

Case No. RS-82-0105

SHELL OIL COMPANY
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001

Petitioner,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI
P.O. Box 475
Jefferson City, Missouri 65105

Respondent.

STATEMENT OF THE CASE, FINDINGS OF FACT CONCLUSIONS OF LAW AND DECISION

Statement of the Case

This matter appears before the Administrative Hearing Commission upon a Complaint filed on March 24, 1982, by Shell Oil Company, Petitioner herein, seeking a hearing and determination that certain portions of Assessment of Unpaid Sales/Use Tax Number 20804, issued by the Director of Revenue, Respondent herein, should be set aside on the grounds that aviation fuel sold by Petitioner is exempt from County Sales and Transportation Taxes because Petitioner does not have a place of business in St. Louis County.

Purusant to 4 CSR 20-2.090 and Section 536.060, RSMo 1978, as made applicale to this Commission by Section 621.135, RSMo Supp. 1984, the parties waived their rights to a formal hearing and submitted to this Commission a Stipulation of Facts herein partially incorporated as Findings of Fact.

Petitioner is represented by Jay C. Welch and Ronald C. Clements, Assistant General Counsel, Missouri Department of Revenue.

Findings Of Fact

1. Petitioner, Shell Oil Company, is a Delaware corporation with its principal business office in Houston, Texas. Petitioner is engaged in the business of marketing various petroleum products, including avaiation fuel, throughout most of the United States.

2. Respondent, Missouri Director of Revenue, is a constitutional officer of the State of Missouri responsible for enforcing and administering various sales tax provisions, including county sales taxes and transportation sales taxes enacted by a county government pursuant to authority granted by Sections 66.200 to 66.635 and Sections 94.600 to 94.655, RSMo.

3. Petitioner has entered into contracts for the sale of aviation fuel with a number of airlines which utilize Lambert-St. Louis International Airport (hereinafter, Lambert Field).[1] The contracts were accepted and signed by Petitioner's employees or officers at Petitioner's Houston, Texas, office. The contracts include an estimated annual gallonage of aviation fuel to be sold to the respective airlines by Shell. (Stipulations 3 and 4.)

4. Lambert Field is located in St. Louis County, Missouri. (Stipulation 6.)

5. Shell has also entered into "certain fuel 'exchange agreements'" with Amoco Oil Company which allow Shell to sell

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[1] The airlines with whom Petitioner has contracted for sale of aviation fuel are: Capital Air; Delta Air Lines, Inc.; Republic Airlines, Inc.; Garude Indonesian Airways; P.T. Mississippi Valley Airlines, Inc.; Ozark Air Lines, Inc.; Pan American World Airways, Inc.; Southern Air Transport, Inc.; Transamerica Airlines; Trans International Airlines, Inc.; United Air Lines, Inc.; World Airways, Inc.; and Zantop International Airlines, Inc. (Stipulation 3.)

aviation fuel at Lambert Field and to deliver the fuel through pipeline from the Amoco Oil Company refinery at Wood River, Illinois. (Stipulation 5.)

6. The aviation fuel sold by Shell to the respective airlines is transported from the Amoco Oil Company refinery at Wood River, Illinois, to Lambert Field through a pipeline owned by the St. Louis Pipeline Company and operated by Amoco Pipeline Company, a wholly owned subsidiary of Standard Oil Company of Indiana. Petitioner has no equity or other ownership interest in Amoco Oil Company, St. Louis Pipeline Company, or the Amoco Pipeline Company. (Stipulations 7 and 8.)

7. At Lambert Field, the fuel passes through a meter owned by Amoco Oil Company and then into the fuel receiving facilities of Allied Aviation Fueling Company of St. Louis, Inc. (hereinafter, Allied Aviation). (Stipulation 9.) Employees of Allied Aviation read the meter, but the stipulations are unclear as to what parties, if any, receive a full accounting of the amount of fuel which passes through the meter. (See Stipulation 9.) The fuel then passes into storage tanks maintained and operated by Allied Aviation. (Stipulation 11.) Allied Aviation receives delivery of aviation fuel from suppliers other than Shell. (Stipulation 14.)

8. Petitioner has no economic or proprietary interest nor any contractual relationship with Allied Aviation. (Stipulation 13.)

9. Allied Aviation records the quantity of fuel delivered into storage, delivers a meter ticket to each airline customer, and sends a copy of the meter tickets to Petitioner at its Chicago Administrative Complex in Oak Brook, Illinois. (Stipulation 16.) The record is unclear as to whether these meter tickets are based upon readings from Amoco's meter or from some other meter.

10. Allied Aviation's employees control the entire process of delivering the aviation fuel from the refinery in Illinois to Allied Aviation's facilities in St. Louis County. Pursuant to instructions of the airlines it serves, Allied Aviation's employ-

ees determine when delivery of the fuel will be made and how much will be delivered. They control the commencement and termination of the deliveries through the pipeline. Finally, Allied Aviation's employees determine which airline is to receive delivery of the fuel. (Stipulation 17.)

11. Allied Aviation is compensated directly by the airlines for the services it renders. (Stipulation 12.)

12. The contracts between the airlines and Petitioner, and the "fuel 'exchange agreement'" between Amoco Oil Company and Petitioner, provide that title to the aviation fuel passes at the Amoco meter. Title passes from Amoco to Shell and then to the respective airlines. The fuel is then placed in Allied Aviation's storage tanks.[2] (Stipulation 18.)

13. Petitioner paid state sales tax on the sales of aviation fuel to the airlines at Lambert Field. Petitioner concedes that "no controversy exists with respect to State sales . . . tax on the sales in question." (Stipulation 24.)[3]

14. Respondent has assessed Petitioner for St. Louis County Sales and Transportation Tax for the period from March 1, 1978, through February 28, 1981, calculated as follows:

Tax	Assessment	Interest	Total
County Sales	52,077.96	16,595.06	68,673.02
Transportation	26,038.98	8,297.53	35,336.51
			103,009.53

(Stipulations 21 and 22.)

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[2] Stipulation 18 states that "title to the aviation fuel . . . passes simultaneously from Amoco to Shell and then to the respective airline when the aviation fuel flows through Amoco's metering device at the Airport and is delivered into storage." Title which passes "from Amoco to Shell and then to the respective airline" is not passing "simultaneously," and we reject this proffered statement as illogical.

[3] The parties decline to specify as to whether Petitioner is liable for sale or use tax. Under these facts, however, it is clear that a sale takes place in Missouri, and therefore, state sales tax law would apply.

Conclusions Of Law

I

This Commission has jurisdiction to hear and decide this matter pursuant to Section 621.050, RSMo Supp. 1984, which provides for appeals to the Administrative Hearing Commission from any assessment made by the Director of Revenue.

II

Section 94.065, RSMo Supp. 1984, authorizes St. Louis County as a "first class county operating under a charter form of government," to "impose a sales tax for transportation purposes . . . ." Section 94.605.2 further permits the sales tax to be imposed

> at a rate not to exceed one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail . . . with any [county] adopting such tax, if such property and services are subject to taxation by the state of Missouri under the provisions of Sections 144.010 to 144. 510, RSMo.

Pursuant to this authority, the St. Louis County Council enacted St. Louis County Mo. Ordinance 6792 (June 23, 1973), imposing "a sales tax of one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail, if such property or services are subject to taxation by the state of Missouri under the provisions of Section 144.010 to 144.510 RSMo." The ordinance further provides that revenue derived from this tax be used for transportation purposes.

Section 66.600, RSMo 1978, authorizes St. Louis County to "impose a county wide sales tax for the benefit of both the incorporated and the unincorporated areas of the county . . . ." Pursuant to Section 66.600, the St. Louis County Council enacted St. Louis County Mo. Ordinance 8378 (Sept. 8, 1977) imposing a one percent county wide sales tax. Except as noted, this statute and the ordinance are similar in language to those governing the transportation tax.

The General Assembly has defined "sale at retail" as

> any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration . . .

Section 144.010, RSMo Supp. 1984.

Section 66.615, RSMo Supp. 1984, requires the Director of Revenue to impose and collect the county sales tax in the same manner as state sales tax and further specifies as follows:

> 5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 66.600 to 66.635 *all retail sales shall be deemed to be consummated at the place of business of the retailer.* . . . In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed consummated at the place of business from which he works. (Emphasis added.)

Section 94.620, RSMo 1984, establishes for the transportation tax a collection procedure similar to that imposed for the county sales tax, and in subsection 5, restates in identical language the place of business provision cited above.

III

Petitioner challenges the assessment of St. Louis County sales and transportation taxes on the grounds it does not have a "place of business" within St. Louis County. Under applicable statutes, the retail sale which is the taxable event is deemed to transpire at the place of business of the seller.

Respondent submitted to this Commission certified copies of St. Louis County Mo. Ordinances 6792 (June 12, 1973) and 8378 (Sept. 8, 1977), which evidence was offered to show Respondent's assessment was based upon lawfully authorized county

sales and transportation taxes. This evidence was submitted after the stipulations were filed with this Commission and after Petitioner argued that the case should be decided in its favor because Respondent had failed to introduce the ordinances into evidence. Petitioner having withdrawn its objection to the late submission, this Commission has reopened the record for the sole purpose of accepting the certified copies of the ordinances into evidence.

County sales and transportation taxes are authorized by state law and established in county ordinances. The state statutory scheme generally works to permit county sales taxes wherever state sales tax applies. Section 66.615, RSMo Supp. 1984; Section 94.620, RSMo Supp. 1984. One notable exception to this general rule is the requirement in subsection 5 of Sections 66.615 and 94.620 that "all retail sales shall be deemed to be consummated at the place of business of the retailer . . . ." As to county sales taxes, then, passage of title is only relevant to the issue of whether the sale took place in Missouri and not to the issue of the situs of the sale for purposes of the county sale tax; the statutes simply designate the vendor's place of business as the point where the sale is consummated. If the vendor has more than one place of business, the sale is deemed under both statutes to be consummated "where the initial order for the tangible personal property is taken." Sections 66.615.5 and 94.620.5. Unfortunately, the statues are silent as to what a "place of business" means.

Missouri courts have, however, grappled with the definition of place of business, and we must consider two Missouri Supreme Court cases in resolving this case. In *Fabick and Co.* v. *Schaeffner*, 492 S.W.2d 737 (Mo. 1973), the court applied an identical place of business requirement in the statute authorizing municipal sales tax to determine that Jefferson City sales tax was due on sales of farm implements by salesmen who went to the purchasers' farms to make the sales, even though the implements were delivered from outside the state directly to the purchasers. The court implicitly found that the seller's

main office was its place of business and that the sales must be deemed to take place there under the place of business rule.

A much more difficult set of facts was presented to the same court a few years later in *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282 (Mo. banc 1978). In this case, the business of the taxpayer was outfitting catering trucks which provided canteen service to workers at construction sites in Missouri and Kansas. The trucks were driven by private contractors who went to worksites and set up shop in public thoroughfares nearby. Respondent alleged that the town in which the company's main office and distribution center was located had the right to tax all proceeds from the trucks, no matter where they were routed, because the sales must be deemed to take place at the main office according to the place of business rule. The court refined its definition of "place of business" concretely, holding that the place of business of canteen trucks is where "the trucks are parked, the wares are displayed, the initial orders are taken and filled, payments therefore are made, and the sales are thereby consummated." *Id.* at 284. The court focused on the indicia of the sales transaction: offer (the display), acceptance (initial orders), and the exchange of consideration (payment and receipt of the goods). Thus, *Mobil-Teria* illustrates that the court focuses upon the indicia of sale as key in determining whether the seller has a place of business within the local taxing jurisdiction. The court distinguishes *Mobil-Teria* from *Fabick* based upon the different roles of their home offies in the sale. In *Fabick* the home office must approve the sale of a specific tangible good by salesmen who work from the home office, a fact situation which clearly fulfills the statutory requirement that "[a] sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works." Sections 66.615 and 94.620. In contrast, the home office in *Mobil-Teria* provides independent contractors with goods, routes and other "perimeters" for the sales, but the actual consummation takes place as a series of later sales.

There has been little case law applying these two cases to aviation gas sales, and we do not find those cases dealing with similar sales to be persuasive. For instance, the Cole County Circuit Court has found that Amoco Oil, the owner of the Lambert Field meter, has no place of business in St. Louis County for purposes of County sales taxes, *Amoco Oil Co.* v. *King*, No. CV184-661CC (Cole Cty. Cir. Ct. Dec. 18, 1984), but the decision does not discuss the effect of *Mobil-Teria* on these facts. In 1981, this Commission itself dismissed a case brought by a supplier of aviation fuel to the Kansas City Mid-Continent Airport on a finding that no tax was due because the Petitioner had no place of business in the taxing jurisdiction. *Texaco, Inc.* v. *Director of Revenue*, No. R-78061 (Mo. Admin. Hearing Comm. Jan. 27, 1981). Again, the decision does not resolve this case because this Commission chose not to render an opinion explicating the Missouri Supreme Court's definition of place of business.

A close examination of the stipulated facts in this case shows that neither the "home office" in Texas, nor the "billing office" in Illinois has a clear nexus to the sales. Stipulation 3 states that the transactions in question begin with "contracts for sale" between Petitioner and various airlines. These agreements are signed by Petitioner at its corporate headquarters in Houston, Texas. The agreements include "estimated annual gallonage." These initial agreements are apparently for future sales: the term "contract for sale" is a common name for what some authorities call "a 'contract to sell' goods." 77 C.J.S. *Sales* Section 1(b) (1952). C.J.S. defines the "contract to sell" as "a contract whereby the seller agrees to transfer the property in goods to the buyer for a price which the buyer pays or agrees to pay, as where there is no price paid for the goods and no delivery of them." *Id.* at Section 1(b). In a contract for sale, the contracted for goods do not actually pass to the buyer, but the buyer obtains a right of action for breach if the transfer does not later occur. *Id.* at Section 1(b). The record is silent as to whether the contracts require the transfer to occur in St. Louis

County or whether any transfer anywhere in the country will do to fulfill the agreement.

However, we infer from the existing agreement between Amoco and Petitioner that Petitioner contemplated that the sale would occur and delivery would be made at Lambert Field. This is analogous to the situation in *Mobil-Teria*. In that case the "home office" entered into agreements with independent contractors in contemplation that they would deliver and sell the goods on site from their trucks. Here, Petitioner entered into an agreement with Amoco in contemplation that Amoco would deliver the fuel to Lambert Field for sale on site, from Amoco's meter.

Next, the parties agree that the fuel is delivered when employees of Allied Aviation determine pursuant to their contracts with the airlines that more fuel is needed. Apparently, Allied Aviation's employees, either with or without the knowledge of Amoco, the owner of the refinery from which the fuel comes, (see Finding of Fact 10), initiate delivery of the fuel. It is clear from the record, however, that Petitioner's fuel is not the only fuel in the pipeline. (See Finding of Fact 7; Stipulation 14.) When the fuel arrives at Lambert Field, it passes through Amoco's meter. At the meter, title passes to Petitioner and then to the airlines. Thus, the fuel is already owned by the airlines when it enters Allied Aviation's storage facilities. Allied Aviation provides each airline and Petitioner with a statement of fuel allocated to each airline, and Petitioner bills the airlines based upon the statements it receives from Allied Aviation.

The stipulations, then, are clear that Petitioner and the airlines enter into contracts for future sale. Petitioner also stipulates that it has an agreement with Amoco permitting it to "sell and deliver aviation fuel at the Airport" using Amoco-produced fuel. Petitioner further stipulates to the fact that the fuel is continuously available from the pipeline, and the employees of Allied Aviation can receive delivery by activating

a pump at any time. Therefore, an individual airline's request for service from Allied Aviation gives rise to a sale which consummates the prior contracts for sale between it and Petitioner.

Section 144.010.7 defines a "sale at retail" as "*any transfer* . . . of the ownership of, or title to, tangible personal property . . . ." (Emphasis added.) Here, there is clearly a transfer of the fuel from Amoco to Petitioner and finally to the airlines. The latter transfer is made possible only by Amoco's agreement with Petitioner allowing Petitioner to use the Amoco meter as a site for its sale to the respective airlines. Further, the aviation fuel is made available at the meter site, accepted at the meter site, and the subsequent reimbursement to Petitioner is based upon data gathered at the meter site. Thus, consistent with *Mobil-Teria's* functional approach, we find that Petitioner has a place of business at Lambert Field.

Decision

It is the decision of this Commission that Petitioner is liable for county sales and transportation taxes for the sale of aviation fuel to airlines servicing Lambert Field in St. Louis County. Therefore, the assessment of Respondent is upheld.

WHEREFORE, it is hereby Ordered that this case be dismissed from the docket of this Commission, effective this date.

SO ORDERED this 31 day of March, 1986

/s/_____

Hon. Hugh A. Sprague
Commisioner

No. 68871

Administrative Hearing Commission No. RS-83-0105

In the Supreme Court of Missouri

May Session, 1987

SHELL OIL CO.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Administrative Hearing Commission rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant costs and charges herein expended and have therefor execution.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1987, and on the 16th day of June 1987, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 16th day of June 1987.

/s/_____Clerk

/s/_____D.C.

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102
July 14, 1987

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mr. David C. Agee
Mr. Richard L. Schnake
One Corporate Centre, Suite 1-130
P.O. Nox 4203 G.S.
Springfield, Missouri 65808

Re: Shell Oil Company vs. Director of Revenue, No. 68871

Gentlemen:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/_____
Clerk

cc: Mr. Richard L. Wieler
(Assistant Attorney General)

IN THE SUPREME COURT OF MISSOURI

Case No. 68871

SHELL OIL COMPANY,

Petitioner,

v.

DIRECTOR OF REVENUE,

Respondent.

Duplicate Of Filing On
Sep 22 1987
In Office Of
Clerk Supreme Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Shell Oil Company, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Missouri affirming the decision of the Missouri Administrative Hearing Commission that Petitioner is liable for St. Louis County sales and St. Louis County transportation sales taxes and holding that the imposition of said taxes on Petitioner is not invalid under the Commerce Clause and Due Process Clause of the United States Constitution, which judgment was entered in this cause on June 16, 1987, and Petitioner's Motion for Rehearing overruled on July 14, 1987.

This appeal is taken pursuant to 28th U.S.C. Sec. 1257(2).

Respectfully submitted,

NEALE, NEWMAN, BRADSHAW & FREEMAN

/s/By _____

David C. Agee #28648

/s/_____

Richard L. Schnake #30607

One Corporate Centre, Suite 1-130
P.O. Box 10327
Springfield, MO 65808
417/882-9090

ATTORNEYS FOR PETITIONER
SHELL OIL COMPANY

CERTIFICATE OF SERVICE

I do hereby certify that I served a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Mrs. Melodie Powell, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102, counsel for Respondent, by depositing the same in the United States mail, postage prepaid, this 21st day of September, 1987.

/s/_____
Richard L. Schnake

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

U.S. Const. Art. I, § 8, cl. 3:

> The Congress shall have power: . . . To regulate commerce . . . among the several states . . . .

U.S. Const. amend. XIV, § 1:

> . . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 66.600 (1978):

> **County sales tax authorized, when—form of ballot—rate—use of brackets authorized (St. Louis county).**—1. The governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more may, by adopting an ordinance, impose a countywide sales tax for the benefit of both the incorporated and the unincorporated areas of the county; provided, however, that no ordinance enacted pursuant to the authority granted by the provisions of sections 66.600 to 66.635 shall be at variance with the provisions as set forth in sections 66.600 to 66.635 . . .
>
> 2. The sales tax may be imposed at a rate of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any county adopting the tax, if the property and services are subject to taxation by the state of Missouri under the provisions of sections 144.010 to 144.510, RSMo. . . .

Mo. Rev. Stat. § 66.605 (1978):

> **Taxable transactions (St. Louis county).**—The ordinance imposing the county sales tax under the provisions of sections 66.600 to 66.635 shall impose upon all sellers a

tax for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto; except that the rate of the tax shall be the one percent imposed by the ordinance as the county sales tax. . . .

Mo. Rev. Stat. § 66.615 (1978 & Cum. Supp. 1984):[1]

Tax to be imposed and collected in same manner as state tax (St. Louis County).—1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 66.600 to 66.635:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax . . . shall apply to the collection of the tax imposed by Sections 66.600 to 66.635, except as modified in sections 66.600 to 66.635.

. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 66.600 to 66.635, all retail sales shall be deemed to be consummated at the place of business of the retailer except for (1) tangible personal property sold which is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination and (2) except for

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[1] The version of § 66.615 reprinted here is from the 1984 Cumulative Supplement to the 1978 statutory revision. In 1979 the Missouri General Assembly enacted two bills containing this section, repealing and reenacting the previous § 66.615. One of the bills was effective March 6, 1979, and the other was effective September 28, 1979. The versions of the sections contained in the two bills are identical insofar as is pertinent here, and they are also identical in relevant part to the version of § 66.615 that was in force prior to its repeal and reenactment by these two bills. For brevity, only one version of § 66.615 has been reprinted here.

the sale of motor vehicles which is provided for in section 66.630. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works.

Mo. Rev. Stat. § 94.600 (1978):

Definitions.—The following words, as used in sections 94.600 to 94.655, shall have the following meaning unless a different meaning clearly appears from the context:

(1) **"City"** shall mean any incorporated city, town, or village in the state of Missouri with a population of five hundred or more, and any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants;

. . . .

(9) **"Transportation purposes"** shall mean financial support of a "public mass transportation system"; the construction, reconstruction, repair and maintenance of streets, roads, and bridges within a municipality; the construction, reconstruction, repair and maintenance of airports owned and operated by municipalities; the acquisition of lands and rights-of-way for streets, roads, bridges and airports; and planning and feasibility studies for streets, roads, bridges, and airports. . . . Notwithstanding the other provisions of this subdivision, in first class counties operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants, **"transportation purposes"** shall mean financial support of a "public mass transportation system"; the construction, reconstruction, repair and maintenance of streets, roads and bridges which are a part of a county-urban road system established by the governing body of the county; planning and

feasibility studies for streets, roads and bridges for a county-urban road system; and rapid transit purposes . . . .

Mo. Rev. Stat. § 94.605 (1978):

Tax, how imposed—. . . 1. Any city not within a county, any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants, and any city of over four hundred thousand inhabitants wholly or partially within a first class county, may be a majority vote of its governing body impose a sales tax for transportation purposes enumerated herein.

. . . .

4. The sales tax may be imposed at a rate not to exceed one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any city adopting such tax, if such property and services are subject to taxation by the state of Missouri under the provisions of sections 144.010 to 144.510, RSMo.

. . . .

Mo. Rev. Stat. § 94.610 (1978):

Ordinance, required provisions in.—The ordinance imposing a sales tax under the provisions of sections 94.600 to 94.655 shall impose upon all persons in such city who are engaged in the business of selling tangible personal property and taxable services subject to a sales tax under the provisions of sections 144.010 to 144.510, RSMo, a tax for the privilege of engaging in such business at the rate imposed by said ordinance and in the manner and to the extent provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto. . . .

Mo. Rev. Stat. § 94.620 (1978 & Cum. Supp. 1984):[2]

1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.600 to 94.655:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax . . . shall apply to the collection of the tax imposed by sections 94.600 to 94.655, except as modified in sections 94.600 to 94.655.

. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 94.600 to 94.655, all retail sales shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's agent or employee shall be deemed to be consummated at the place of business from which he works.

Mo. Rev. Stat. § 144.020 (1978 & Cum. Sup. 1984):

Rate of tax.—1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. . . .

Mo. Rev. Stat. § 144.021 (1978):

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[2] The version of § 94.620 reprinted here is from the 1984 Cumulative Supplement to the 1978 statutory revision. This version and the version preceding it are identical in relevant respects, and consequently only this version has been reprinted here.

Imposition of tax—seller's duties.—The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or service . . . .

Mo. Rev. Stat. § 144.080 (1978 & Cum. Supp. 1984):

Seller responsible for tax—. . . 1. Every person receiving any payment or consideration upon the sale of property or rendering of service, subject to the tax imposed by the provisions of sections 144.010 to 144.510, is exercising the taxable privilege of selling the property or rendering the service at retail and is subject to the tax levied in section 144.020. He shall be responsible . . . for the collection of the amount of the tax imposed on the sale or service . . .

. . . .

4. The seller of any property or person rendering any service, subject to the tax imposed by sections 144.010 to 144.510, shall collect the tax from the purchaser of such property or the recipient of the service to the extent possible . . . , but his inability to collect any part or all of the tax does not relieve him of the obligation to pay to the state the tax imposed by section 144.020 . . . .

St. Louis County, Mo., Ordinance No. 6792 (June 28, 1973):

AN ORDINANCE

IMPOSING AND LEVYING A SALES TAX OF ONE HALF OF ONE PERCENT ON THE RECEIPTS FROM THE SALE AT RETAIL OF ALL TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES AT RETAIL; THE REVENUE GENERATED FROM SAID TAX TO BE USED FOR TRANSPORTATION PURPOSES.

. . . .

BE IT ORDAINED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

SECTION 1. . . . there is hereby imposed and levied within the boundaries of St. Louis County, Missouri, a sales tax of one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail, if such property or services are subject to taxation by the State of Missouri under the provisions of Sections 144.010 to 144.510 R.S.Mo.

SECTION 2. Revenue derived from the imposition of the tax imposed by Section 1 of this ordinance shall be used for transportation purposes . . .

SECTION 3. The provisions, terms, conditions, duties and obligations contained and set forth in House Substitute for House Bill No. 65 enacted by the 77th General Assembly of the State of Missouri are hereby accepted, adopted and incorporated by reference herein . . . .

St. Louis County, Mo., Ordinance No. 8378 (Sept. 13, 1977):

AN ORDINANCE

IMPOSING A ONE PERCENT COUNTYWIDE SALES TAX . . .

BE IT ORDAINED BY THE COUNTY COUNCIL OF ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

SECTION 1. That a one percent Countywide sales tax is hereby imposed in accordance with the provisions of the House Committee Substitute for the Senate Substitute for Senate Bill Number 234 as passed by the First Regular Session of the 79th General Assembly. . . .

---

12 C.S.R. 10-5.545 (1977):

(1) For the purposes of the transportation sales tax law, all retail sales are conclusively presumed to have been consummated at the place of business of the seller/retailer without regard to the location of point of passage of title.

The privilege of engaging in the business of selling tangible personal property or rendering taxable services within taxing jurisdictions subjects the seller to the transportation sales tax law.

(2) The sale is subject to transportation sales tax when a seller makes a taxable sale to a purchaser at the seller's place of business or when the order is taken by mail, telephone or by a salesman, even though the property is to be delivered from the seller's place of business located within such taxing jurisdiction to the customer at a point in Mo. outside the limits of said taxing jurisdiction. The sale is consummated at the seller's location, not at the point of delivery.

. . . .

---

12 C.S.R. 10-5.550 (1977):

(1) If a seller has more than one place of business in Mo. which participates in a sale, the sale is deemed to be consummated at the place of business of the seller where the initial order is taken and the transportation tax of this location would apply. If a seller has only one place of business in Mo. which participates in a sale, the local tax of this location would apply. For the purposes of this rule, place of business shall include, but not be limited to, sales offices, administrative offices, catalog stores, retail stores, warehouses, and factories.

Supreme Court, U.S.
FILED
NOV 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-609

In the Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Appellant,

vs.

DIRECTOR OF REVENUE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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No. 87-609

In the Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Appellant,

vs.

DIRECTOR OF REVENUE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that the appeal does not present a substantial federal question.

I

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity of §§ 66.600 to 66.635, RSMo 1978, and Cum. Supp. 1984, statutes authorizing St. Louis County, Missouri, to adopt an ordinance imposing a countywide sales tax, and §§ 94.600 to 94.655, RSMo 1978 and Cum. Supp. 1984, statutes authorizing St. Louis County to impose a sales tax for trans-

portation purposes.[1] The text of the pertinent statutes is set forth in the Appendix.

B. The Proceedings Below

The Missouri Director of Revenue (hereinafter referred to as Director) assessed appellant for St. Louis County sales tax and St. Louis County transportation sales tax for the period March 1, 1978, through February 28, 1981. The basis of the assessment was appellant's sales of aviation fuel at the Lambert-St. Louis International Airport located in St. Louis County, Missouri.

On March 24, 1982, appellant filed a complaint with the Missouri Administrative Hearing Commission, alleging that the assessment should be set aside because it had no place of business in St. Louis County. The Missouri Administrative Hearing Commission upheld the tax assessment and on April 28, 1986, appellant filed its petition for review of the Administrative Hearing Commission decision with the Missouri Court of Appeals, Western District. After briefing and oral argument, the Missouri Court of Appeals, Western District, transferred the case to the Supreme Court of Missouri on jurisdictional grounds.

The Supreme Court of Missouri, in a four to three decision, upheld the Director's assessment of county sales and transportation sales taxes against appellant. *Shell Oil Company v. Director of Revenue*, 732 S.W.2d 178 (Mo. banc 1987). The Supreme Court of Missouri found that appellant's argument regarding "place of business" was misdirected and held that a sale at retail occurred in St.

---

1. For ease of reference and consistency, appellee will cite the same version of Missouri statutes as has the appellant even though the pertinent portions were unaffected by amendments to the Missouri statutes which are codified in the 1986 statutory revision.

Louis County when Shell, through its arrangement with Amoco Oil and its contracts with airlines, delivered the aviation fuel and passed title to the purchasers and ultimate users, the airlines.

The Supreme Court of Missouri also rejected appellant's argument that the St. Louis County sales and transportation sales taxes violated Article I, § 8, Clause 3 of the United States Constitution, the Commerce Clause. The court found that the transactions in question were totally *intrastate* in character; therefore, no burden on interstate commerce existed. The court further found that the sales of aviation fuel by appellant were inextricably linked to St. Louis County by appellant's continuing presence at Lambert Field. Through the arrangements Shell has with Amoco Oil to use the Amoco meter at Lambert Field and through the delivery of the fuel and passage of title at that meter, appellant fulfills its contracts with the airlines who operate there.

Contrary to appellant's contention in its statement of jurisdiction that it paid state use tax, the actual wording of the stipulation between the parties was that Shell has paid and no controversy exists with respect to state sales or use taxes on the sales in question. The Supreme Court of Missouri found that the intrastate character of the sales of aviation fuel was such that the sales were subject to Missouri *sales tax* and consequently, the county sales and transportation sales taxes which incorporate the statutory limitations of the state sales tax.

The Supreme Court of Missouri also rejected appellant's equal protection argument for similar reasons.

II

ARGUMENT

A.

The Case Presents No Substantial Question For Review Or Decision By This Court

In its statement of jurisdiction, appellant argues that the St. Louis County sales and transportation sales taxes assessed against it by the Director of Revenue are an impermissible burden on interstate commerce. Consistent with its version of the facts, appellant argues that the four-part test of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), is not met, thereby rendering the taxes an impermissible burden on interstate commerce. In addition, appellant claims it is deprived of due process and denied equal protection.

State taxation on the "privilege of doing business" is not per se unconstitutional when applied to interstate commerce. *Complete Auto Transit, Inc. v. Brady, supra.* Interstate commerce must carry its fair share of the state tax burden. *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

Pursuant to appellant's version of the facts, Shell is operating in interstate commerce in making sales of aviation fuel in the state of Missouri. The facts actually show that the transactions in question are *intrastate* in character and render appellant subject to Missouri sales tax and St. Louis County sales and transportation sales taxes.

The Supreme Court of Missouri was correct in ruling that the sales in question are entirely consummated in St. Louis County. The stipulated facts show that appel-

lant and each airline enter into a "contract for sale" for an estimated annual gallonage of aviation fuel. These contracts are contracts for future sales and no delivery of the fuel takes place pursuant to these contracts. Appellant has an "exchange" agreement with Amoco Oil contemplating a transaction to occur at Lambert Field, St. Louis County, Missouri. Appellant expects Amoco to deliver fuel to the meter at Lambert Field for sale on site from the meter. Upon arriving at Lambert Field, the fuel passes through the Amoco meter and at that moment, title to the fuel passes to Shell. Subsequently appellant transfers title to the fuel to each airline. Appellant bills each airline based on statements received from Allied Aviation, the storage service. Statements from Allied are based upon data gathered at the meter site. The transfer of title to the aviation fuel from Amoco to Shell and then from Shell to each airline is done pursuant to the agreement allowing Shell to use Amoco's meter at Lambert Field as a site for its sale to each respective airline. Therefore, the sale at retail is consummated at the meter site entirely within St. Louis County. No interstate commerce or interstate transportation is involved in the sale.

County sales and transportation sales taxes are taxes for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail. Section 66.605, RSMo 1978, and § 94.610, RSMo 1978. As such, these taxes are not in violation of the Commerce Clause because the transactions forming the sales at retail are consummated wholly within the state of Missouri and do not involve interstate commerce or interstate transportation.

Regardless of the fact that Shell is a large multinational corporation doing business in a number of states

within this country. Shell is still responsible for taxes assessed on its local intrastate transactions and activities. Shell cannot shade its local activities by cunning agreements with other oil companies, airlines, and storage facilities.

The Supreme Court of Missouri correctly upheld the assessment of the tax.

III

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

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APPENDIX

§ 66.600, RSMo 1978:

> **County sales tax authorized, when—form of ballot—rate—use of brackets authorized (St. Louis county).**—1. The governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more may, by adopting an ordinance, impose a countywide sales tax for the benefit of both the incorporated and the unincorporated areas of the county; provided, however, that no ordinance enacted pursuant to the authority granted by the provisions of sections 66.600 to 66.635 shall be at variance with the provisions as set forth in sections 66.600 to 66.635; . . .

§ 66.605, RSMo 1978:

> **Taxable transactions (St. Louis county).**—The ordinance imposing the county sales tax under the provisions of sections 66.600 to 66.635 shall impose upon all sellers a tax for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto; except the rate of the tax shall be the one percent imposed by the ordinance as the county sales tax. . . .

§ 66.610, RSMo Cum. Supp. 1984:

Director of revenue to collect tax for county (St. Louis County).—After the effective date of any tax imposed under the provisions of sections 66.600 to 66.635, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri the additional tax authorized under the authority of sections 66.600 to 66.635. . . .

§ 66.615, RSMo Cum. Supp. 1984:

Tax to be imposed and collected in same manner as state tax (St. Louis County).—1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 66.600 to 66.635:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax and section 32.057, RSMo, the uniform confidentiality provision, shall apply to the collection of the tax imposed by sections 66.600 to 66.635, except as modified in sections 66.600 to 66.635. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 66.600 to 66.635, all retail sales shall be deemed to be consummated at the place of business of the retailer except for (1) tangible personal property sold which is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination and (2) except for the sale of motor vehicles which is provided for in section 66.630. In the event

a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works.

§ 94.600, RSMo Cum. Supp. 1984:

Definitions.—The following words, as used in section 94.600 to 94.655, shall have the following meaning unless a different meaning clearly appears from the context:

(1) **"City"** shall mean any city not within a county, any city of over four hundred thousand inhabitants wholly or partially within a first class county, and any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants; . . .

§ 94.605, RSMo Cum. Supp. 1984:

Tax, how imposed—rate of tax—ordinance, notice and contents—tax effective, when—boundary changes, procedure—brackets for tax rate authorized.—1. Any city not within a county, any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants, and any city of over four hundred thousand inhabitants wholly or partially within a first class county,

may by a majority vote of its governing body impose a sales tax for transportation purposes enumerated herein.

2. The sales tax may be imposed at a rate not to exceed one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any city adopting such tax, if such property and services are subject to taxation by the state of Missouri under the provisions of sections 144.010 to 144.510, RSMo. . . .

§ 94.610, RSMo 1978:

Ordinance, required provisions in.—The ordinance imposing a sales tax under the provisions of sections 94.600 to 94.655 shall impose upon all persons in such city who are engaged in the business of selling tangible personal property and taxable services subject to a sales tax under the provisions of sections 144.010 to 144.510, RSMo, a tax for the privilege of engaging in such business at the rate imposed by said ordinance and in the manner and to the extent provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto. . . .

§ 94.615, RSMo 1978:

Director of revenue, duties of—tax, how collected and reported.—On and after the effective date of any tax imposed under the provisions of sections 94.600 to 94.655, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and

the director of revenue shall collect in addition to the sales tax for the state of Missouri and any city sales tax imposed by sections 94.500 to 94.570, where applicable, the additional tax authorized under sections 94.600 to 94.655. . . .

§ 94.620, RSMo 1978:

Collection procedure — confidentiality, exceptions — exemptions — certificates — presumptions — penalties. — 1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.600 to 94.655:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax . . . shall apply to the collection of the tax imposed by sections 94.600 to 94.655, except as modified in sections 94.600 to 94.655. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 94.600 to 94.655, all retail sales shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's agent or employee shall be deemed to be consummated at the place of business from which he works.

§ 144.010, RSMo Cum. Supp. 1984:

> **Definitions—rules suspension and reinstatement—procedure.**—1. The following words, terms, and phrases when used in sections 144.010 to 144.510 have the meanings ascribed to them in this section, except when the context indicates a different meaning: . . .
>
> (8) **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; . . .

§ 144.020, RSMo Cum. Supp. 1984:

> **Rate of tax.**—1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. . . .

Supreme Court, U.S.
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No. 87-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Appellant,

v.

DIRECTOR OF REVENUE OF MISSOURI,
Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-609

SHELL OIL COMPANY, *Appellant*,

v.

DIRECTOR OF REVENUE OF MISSOURI, *Appellee*.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ARGUMENT

Appellee's Motion to Dismiss or Affirm ("Motion") rests upon Appellee's premise that imposition of the St. Louis County sales and transportation sales taxes in question is not unconstitutional because Shell's aviation fuel sales are *intra*state. As a factual proposition that argument is plainly wrong. Furthermore, Appellee's argument tacitly concedes that Shell's transactions involve *inter*state commerce. The Motion is without foundation, and it should be overruled.

A. The Sales Are Interstate.

(1)

Appellee argues that the "facts actually show that the transactions in question are *intrastate* in character"

because "the sales in question are entirely consummated in St. Louis County" and, consequently, that "[n]o interstate commerce or interstate transportation is involved." Motion, at 4, 5. He points to a number of factors that he claims render Shell's sales purely intrastate. *Id.* Many of those enumerated factors clearly misstate the facts.[1] None of those factors, however, makes the sales in question any less interstate in character. Neither Appellee nor the Supreme Court of Missouri can turn interstate sales

---

[1] Appellee's recitation of the facts errs in at least the following respects: (1) As noted below, Appellee insists that Shell's contracts with the airlines are "contracts for future sales and no delivery of the fuel takes place pursuant to these contracts." Motion, at 5. Yet nothing more is required before the employees of Allied, the airlines' agent, are permitted to request delivery of the fuel; the contracts, quite clearly, are the basis for the delivery. (2) Nothing in the stipulation of facts supports the statement that Shell's exchange agreement with Amoco contemplates "a transaction to occur at" the Airport. *Id.* The agreement in fact contemplates only delivery of the fuel to Allied, the airlines' agent, in conjunction with Shell's interstate transaction. (3) Furthermore, nothing in the stipulation states that the exchange agreement "allow[s] Shell to use Amoco's meter." *Id.* Shell merely uses Amoco fuel. Allied's employees "read" the meter and send tickets to Shell and the airlines. (4) Shell's sales are to airlines serving the Airport, but they are not sales "at the . . . Airport." *Id.*, at 2. (5) Appellee also refers twice to the Airport meter as the "site" of the sales, *id.*, at 5, but it is clear that the meter simply measures the fuel again at the place of *delivery*. (6) Appellee's statement that title to the fuel passes from Amoco to Shell when the fuel passes through Amoco's Airport fuel meter but that "[s]ubsequently appellant transfers title to the fuel to each airline," *id.*, is misleading insofar as it implies that there is a disruption in the flow of the fuel from the Amoco refinery in Wood River, Illinois, to Allied's storage facilities in St. Louis County, Missouri. (7) Finally, as noted below, Appellee's statement that "[n]o interstate commerce or interstate transportation is involved in the sale," *id.*, at best ignores the interstate incidents of the sales and at worst misrepresents the fact that the fuel is transported from Illinois to Missouri.

into intrastate sales simply by ignoring those portions of the transactions occurring outside of Missouri.

First, Shell's aviation fuel contracts with the various airlines are made outside of Missouri. They are accepted and executed by Shell at its office in Houston, Texas. While Appellee argues that those contracts "are contracts for future sales and no delivery of the fuel takes place pursuant to these contracts," Motion, at 5, it is clear that nothing more is involved—employees of Allied, the *airlines'* agent, simply request delivery of the fuel pursuant to those contracts whenever it is needed.

Second, the fuel moves in interstate transportation, and thus in interstate commerce. It comes from Amoco Oil Company's refinery in Wood River, Illinois, through an interstate pipeline, is measured in transit by Amoco Oil Company's fuel meter at the Airport (which employees of Allied, not Shell, operate), and is delivered into Allied's storage facilities in St. Louis County, Missouri. Appellee's argument that "[n]o interstate commerce or interstate transportation is involved," Motion, at 5, is absurd. As with natural gas, aviation fuel "crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland* v. *Louisiana*, 451 U.S. 725, 755 (1981). *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 169 (1954).[2] How, then, can Appellee main-

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[2] In *Calvert*, Texas attempted to tax the pipeline company on the basis of the delivery of, and passage of title to, natural gas in the pipeline as it came from the seller's refinery and into the company's connecting pipeline. The Court held that such a tax was an impermissible burden on interstate commerce. *Id.* at 170. It rejected the State appellate court's argument that the passage of title between the "taking" of the gas, which the statute made the taxable event, and transmission of the gas in interstate commerce was sufficient to

tain that the passage of title from Amoco to Shell at the instant the fuel passes through the Amoco Oil Company meter at the Airport removes the fuel from interstate commerce prior to the fuel reaching the "ultimate consumer"?

Third, Shell bills the airlines for the fuel from its administrative center in Oak Brook, Illinois. Clearly billing and payment are an integral part of the sale transaction. The Supreme Court of Missouri has clearly stated that for purposes of local sales taxes, sales are not consummated until payment is made. In *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282, 284 (Mo. 1978) (en banc), which addressed a tax indentical to the taxes at issue here, that court said that the "sales are . . . consummated" by payment for the goods.[3]

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separate the "taking" from the interstate portion of the transaction. The Court explained:

> "As for the interference of title passing, . . . we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process'. . . . The separation must be realistic." *Id.*, at 169.

See also Illinois Natural Gas Co. v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-04 (1942).

[3] *See* Mo. Rev. Stat. § 400.2-106(1) (1986) (under Uniform Commercial Code, a "sale" "consists in the passing of title from the seller to the buyer *for a price*" (emphasis added)). *Cf. State ex rel. Smith* v. *City of Springfield*, 375 S.W.2d 84, 87 (Mo. 1964) (en banc) ("the sale and purchase was consummated by transfer of the properties . . . and the payment of the purchase price"); *Bertram* v. *Kempster*, 216 S.W.2d 494, 495 (Mo. 1949) (sale of real property "was consummated by defendants' execution of a deed to plaintiffs and by plaintiffs' payment").

Appellee's argument mirrors the opinion of the Supreme Court of Missouri below, and it suffers from the same fatal flaw: The transparent attempt to justify taxation of Shell deliberately ignores the interstate elements of the sales. Appellee refers more than once to Shell's "version of the facts," Motion, at 4, but it is Appellee's "version of the facts" that is entirely misleading.[4] The sales are *not* intrastate. Appellee's argument to the contrary is wrong.

(2)

The Supreme Court of Missouri held that Shell's constitutional challenge "evaporate[d]" because that court "found the sale [sic] to be intrastate in character." App. to Juris. Statement, at 7a. This Court is not, however, required to accept that finding blindly. This Court has clearly said that it

> "is . . . not bound by the state court's determination that the challenged tax is not a tax on interstate commerce. 'The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the

[4] Appellee also states that Shell is attempting to "shade its local activities by cunning agreements with other oil companies, airlines, and storage facilities." Motion, at 6. That accusation implies some sort of impropriety that has never been suggested heretofore. It is curious why Appellee finds it necessary to resort to the allegation of "shad[y]," "cunning" activities if, as Appellee contends, the sales were truly intrastate. Shell takes strong exception to this unfounded accusation. The contracts with the airlines are the foundation of the seller-purchaser relationship. Shell's exchange agreement with Amoco Oil Company is a type commonly used in the petroleum industry, and it is perfectly legitimate. Finally, Shell is not a party to the agreements for use of Allied's storage facilities, which are purely between Allied and the airlines.

> highest court of the State, is or is not "a tax on interstate commerce."'" *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 107-08 (1975) (quoting *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 393 (1952)).

See Calvert, 347 U.S., at 165 (Court accepted State court's determination of operating incidence of tax, but disagreed with its conclusion of constitutionality).[5] Were it otherwise, State courts could pretermit this Court's review by a finding, whether supported by evidence or not, that interstate commerce was not involved. Appellee would have this Court abdicate its constitutional function by accepting outright the conclusion of the court below, which is clearly contrary to fact and is aimed solely at upholding local taxation.[6] This Court must refuse to do

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[5] *See also In re Primus*, 436 U.S. 412, 434 (1978), in which the Court noted that

> "'considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964)).

[6] Appellee points out that the parties stipulated that Shell had paid over to the State, and no controversy existed with respect to, sales or use taxes due the State itself. Motion, at 3. Shell has always contended that it paid over State use taxes, *see* Juris. Statement, at 8, while Appellee has always contended that Shell paid State sales taxes; but, since the amounts of those taxes were the same, and since in either event Shell was able to collect the funds from its customers, there was no dispute between Shell and the State. But while Missouri has authorized St. Louis County to impose and collect *local sales* taxes, it has not authorized imposition of *local compensating use* taxes. The Supreme Court of Missouri failed to recognize this important distinction. In determining whether imposition of the local sales

so. The attempted imposition of St. Louis County sales and transportation sales taxes against Shell in contravention of the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment presents a substantial federal question that this Court should address. Appellee's Motion should be overruled.

B. Appellee's Argument Tacitly Concedes That Shell's Sales Are In Interstate Commerce.

Appellee's contention that Shell's sales are purely intrastate in character undermines itself by tacitly conceding that the sales are, in fact, interstate. Citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), Appellee intones the general principles he finds in those cases that "State taxation on the 'privilege of doing business' is not per se unconstitutional when applied to interstate commerce" and that interstate commerce "must carry its fair share of the state tax burden." Motion, at 4. There would be no need for reference to those decisions if, as Appellee then argues, the sales in question were in fact purely intrastate. Nor would there by any need to accuse Shell of "shad[y]," "cunning" activities. *See* Motion, at 6; note 5,

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and transportation sales taxes is constitutionally permissible, the inquiry must focus on the "actuality of operation" of the tax system: "a proper analysis must take 'the whole scheme of taxation into account.'" *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963). Yet the unarticulated rationale underlying the decision below is simply that Shell must be made to bear some local tax burden notwithstanding the fact that if Shell had a place of business in Missouri, outside of St. Louis County, these taxes would not be due.

supra. By their mere presence, those references acknowledge the interstate character of Shell's sales.

CONCLUSION

The questions presented in this appeal are substantial.[7] The absence of any attempt by Appellee to address any of the several issues raised underscores the validity of Shell's appeal. No place does Appellee explain *why* he believes that this appeal presents no substantial federal question. This Court has jurisdiction, and Appellee's Motion to Dismiss for want of a substantial federal question therefore should be overruled. The decision of the Supreme Court of Missouri was incorrect, and Appellee's alternative Motion to Affirm should likewise be overruled. This Court should note probable jurisdiction of this appeal and should docket the case for briefing and oral argument.

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[7] In view of the holding of the Supreme Court of Missouri that Shell has a nexus to St. Louis County through its "agents," which could be none other than the companies responsible solely for *delivery* of the fuel, *see* Juris. Statement, at 10, 12-15, this case may present questions analogous to those in *D.H. Holmes Co.* v. *McNamara*, No. 87-267, in which this Court recently noted probable jurisdiction of the taxpayer's appeal.

(5)

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No. 87-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE OF MISSOURI,

Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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APPELLANT'S REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Shell makes the following response to the *amicus curiae* brief the United States has filed in support of imposition of the taxes in question.

A. The Interstate Nature Of The Sales.

The argument of the United States that Shell is purely an in-State seller and that the sales in question are intrastate contradicts the stipulated facts and strains both logic and law. Moreover, the position it advances would preclude a finding of interstate commerce in those situations, such as this one, in which goods sold by a middleman are shipped directly from his supplier in one state to

his buyer in another. Such a position contradicts this Court's previous decisions.

Shell's role in the sales at issue is essentially that of a middleman, or broker. Shell never physically possesses the fuel. Through its exchange agreements with Amoco Oil Company, Shell uses Amoco fuel to fulfill its Texas contracts with the airlines; Amoco's consideration is the right to use Shell fuel elsewhere. The fuel is shipped directly from the supplier, Amoco, in Illinois to the buyers, the airlines (through their agent, Allied), in Missouri. Delivery is made via a third party pipeline carrier. Shell's only involvement with the fuel is in the necessary technical passage of title simultaneously from supplier to middleman to broker at the time of delivery. It is stipulated that Shell has no physical facilities or employees in St. Louis County, or anywhere else in Missouri, related in any way to these sales.

Nothing in these facts supports the proposition, urged by Appellee and the United States, that the sales are purely *intra*state. Indeed, this Court's decisions clearly hold that such middleman activities are in interstate commerce, both where the goods are shipped directly from the supplier in one state to the buyer in another without going through the hands of the middleman, *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52, 63-64 (1927), and when the middleman physically possesses the goods in the buyer's state before transferring them to the buyer, *People's Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 552-54 (1926). Holding Shell liable for county sales taxes would subject all interstate middlemen to state and local sales taxes on like sales made in interstate commerce.

The United States points to three factors that it contends make the sales in question purely intrastate. First,

it points out that title passes from Shell to the airlines at the Airport, and it complains that Shell did not own the fuel until it was present in Missouri. Brief of Amicus Curiae, at 9-10. Second, it states that Shell delivers the fuel at the Airport. *Id.*, at 10. Third, it argues that the fuel orders are placed at the Airport. *Id.*

With regard to the fuel orders, the United States has mischaracterized the facts. It states that "orders for particular quantities of fuel . . . were placed by the airlines through Allied's employees, presumably at the airport, who passed on the orders and controlled the deliveries." *Id.* The presumption that the orders are placed at the Airport is unsupported by the stipulation of facts,[1] and the statement that Allied's employees merely "passed on the orders" is misleading. The airlines do not order the fuel from Allied. Allied, as the *airlines'* agent, requests delivery of the fuel directly from the Amoco Oil Company refinery in Illinois. *Id.* paras. 5, 17. The fuel is delivered into an interstate carrier pipeline owned and operated by third parties. *Id.* paras. 7-10. Since Shell has no personnel or facilities at the Airport, or anywhere else in Missouri, involved in the aviation fuel sales, *id.* para. 19, it is clear that orders are not placed at the Airport. Delivery requests are made directly to an out-of-state location, the Amoco refinery in Wood River, Illinois. Indeed, there is no other place to which they can be made, since the pipeline runs from the refinery. *Id.* para. 5.

The United States' argument regarding delivery of the fuel, *see* Br. of Amicus Curiae, at 10, 11, likewise mischaracterizes the transactions by omitting portions of the

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[1] The stipulation of facts is reprinted as an Appendix to the Brief of the United States as Amicus Curiae. Citations here to the stipulation are by paragraph number.

stipulated facts and purporting to supply others. Shell does *not* deliver the fuel. The fuel is delivered by, and through, third party pipeline carriers in which Shell has no economic or proprietary interest. Stip. paras. 5, 7-8.[2] Thus it *does* matter that the Supreme Court of Missouri based its findings of Shell's presence in St. Louis County on the asserted agency of the parties responsible solely for delivery of the fuel, *see* Juris. Statement, at 13-14, since an out-of-state seller may not be subjected to taxation when its only contact with the taxing jurisdiction is through a third-party carrier, *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 539 (1951).[3] The United States' suggestion that Shell has a

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[2] The United States quotes that portion of the stipulation stating that Shell's agreements with Amoco Oil Company "allow appellant to 'deliver aviation fuel at the airport.'" Br. of Amicus Curiae, at 10. The stipulation actually states that those agreements permit Shell to "deliver aviation fuel at the airport *via pipeline from the Amoco Oil Company refinery at Wood River, Illinois.*" Stip. para. 5. The stipulation furthermore makes it clear that the pipeline is owned and operated by unrelated third parties. *Id.* paras. 7-8.

[3] The United States attempts to distinguish *National Bellas Hess* and *Norton* on two grounds, neither of which is valid. First, it argues that in those cases the purchasers ordered goods that they "knew would come from the seller's out-of-State stock." Br. of Amicus Curiae, at 11. Nothing in the opinions in those cases, however, indicates that the purchasers had any knowledge whether the goods would in fact be shipped from out of State; indeed, Norton Company even maintained in-State stores, and its purchasers might logically have assumed that the goods would be routed from one of the in-State facilities. More importantly, it makes no diffference here. Contrary to the contention of the United States, *id.*, at 11-12, the airlines do not request fuel delivery "without regard to the source of the fuel." Allied, and through it the airlines, are well aware that the fuel comes from Amoco's refinery in Illinois, since the pipeline runs from the

direct contractual arrangement with the carriers, *see* Br. of Amicus Curiae, at 11, is wholly unsupported by the stipulation. Shell's only agreement is with Amoco Oil Company. Stip. para. 5.

The passage of title from Shell to the airlines in Missouri, *see* Br. of Amicus Curiae, at 10-11, simply cannot be enough to render the sales intrastate. The United States argues that "it would be consistent with this Court's decisions to identify the place of passage of title, or ownership, as the single determinitive factor that fixes the location for a particular sale." *Id.*, at 8. Such a test, however, would be illogical in the context of an interstate sale. Title must necessarily pass somewhere. A test that looks to nothing other than passage of title would effectively preclude any finding of interstate commerce, since under such a test one state or another would always have authority to tax the sale. As for the argument that Shell did not own the fuel until the fuel was present in Missouri, *id.*, at 10, 12, the none too short answer is that this Court has repeatedly said that the mere passage of title during movement of the goods to their intended destination does not alter the interstate character of the entire transaction. *E.g.*, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 169 (1954); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 503-04 (1942); *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S.

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refinery and it is Amoco's meter that measures the fuel as it leaves the pipeline. Stip. paras. 5, 9.

Second, the United States argues that in neither *National Bellas Hess* nor *Norton* "is there any suggestion that title to the shipped goods was passed to the purchaser within the taxing State." Neither, of course, is there any indication that it was not. But in any event, as discussed below, the mere passage of title cannot, of itself, determine whether sales are or are not interstate.

465, 470 (1931); *People's Natural Gas Co.*, 270 U.S., at 554.

The United States contends that it is irrelevant that the fuel was obtained from an out-of-State supplier and that it was delivered by third parties unrelated to Shell. Br. of Amicus Curiae, at 10. It is wrong on both points. As noted above, *see* note 3, *supra*, since the pipeline runs from the Amoco refinery and Amoco's meter measures the fuel at the Airport, Allied, and through it the airlines, are well aware that the fuel must be shipped from Illinois, and they obviously contemplate that it will be. Hence *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169 (1935), has no application. Where, as here, it is contemplated that the goods will be shipped to the buyer from an out-of-State source, the transaction is interstate in character. *Pacific States Paper*, 273 U.S., at 65. *See Flanagan* v. *Federal Coal Co.*, 267 U.S. 222, 225 (1925). Neither are *Sonneborn Brothers* v. *Cureton*, 262 U.S. 506 (1923), and *J. Bacon & Sons* v. *Martin*, 305 U.S. 380 (1939), apposite, for in those cases the interstate transportation had ended and the goods were in the physical control of the seller for further disposition within the taxing jurisdiction. Such is not the case here, where the interstate transportation continues uninterrupted until the aviation fuel reaches the ultimate consumers (or their agent, Allied). *See People's Natural Gas Co.*, 270 U.S., at 554. *Cf. Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943) (even temporarily *holding* goods in warehouse does not end interstate journey where there is a "practical continuity" of movement from out-of-State supplier, through warehouse, and on to customers whose prior orders or contracts are being filled). Insofar as delivery by unrelated third parties is concerned, the United States' reliance on *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649 (1942), is sim-

ilarly misplaced, for there the taxpayer's activities "went beyond the mere sale, to a distributor, of gas in interstate commerce," since the taxpayer also participated with the purchasers "in the business of distributing the gas to consumers after its delivery" to the purchaser, *id.*, at 656.

The United States concedes that which the Supreme Court of Missouri failed to recognize: that this case deals with an attempt to impose a *sales* tax directly on the seller, Shell, rather than require the seller to collect a *compensating use* tax imposed upon the purchaser. *See* Br. of Amicus Curiae, at 12 n. 12. Shell has never disputed its obligation to collect and pay over compensating use taxes on the sales in question, and in fact it has done so with regard to taxes due the State itself. Stip. para. 24. But Missouri has not authorized St. Louis County to impose a *local* compensating use tax. Thus, regardless whether Shell has unrelated Missouri activities to support imposition of the duty to collect use taxes, *see National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 560-61 (1977), the absence of any Shell facilities or personnel in St. Louis County, or elsewhere in Missouri, in any way related to the aviation fuel sales in question, Stip. para. 19, precludes imposition of a direct tax against Shell on those sales, *Norton*, 340 U.S., at 537, 539; *see National Geographic*, 430 U.S., at 560-61.

In short, Shell's sales are interstate, and the factors upon which the United States relies do not constitute a nexus sufficient to satisfy the requirements of the first prong of the test enunciated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The requests for delivery of the fuel are placed to an out-of-State location, the Amoco refinery, and hence are not intrastate. Delivery is made by third party carriers having no relationship

to Shell. And while title passes from Shell to the airlines at the Airport, that fact, alone, is not determinative. It is absurd even to suggest that Shell "could not conceivably be described as an out-of-State seller." Br. of Amicus Curiae, at 12.[4] The transactions here are typical middleman-type sales in interstate commerce. *See Pacific States Paper*, 273 U.S., at 63-64; *People's Natural Gas Co.*, 270 U.S., at 552-54. To hold otherwise would be to subject all like sellers to State or local sales taxes regardless of the interstate nature of their businesses.

B. The Discrimination Against Interstate Commerce.

The United States' discussion of Shell's discrimination argument misapprehends Shell's position. The applicable Missouri statutes provide (1) that for purposes of local sales taxes, "all retail sales shall be deemed to be consum-

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[4] Other incidents of the sales, which the United States either ignores or misstates, further demonstrate the interstate nature of the transactions. Shell's contracts with the airlines, pursuant to which the airlines request delivery of the fuel, are accepted and executed by Shell in Houston, Texas. Stip. para. 3. The exchange agreements are accepted by Shell in Houston and by Amoco in Chicago, Illinois. *Id.* para. 5. And contrary to the assertion that the fuel deliveries are "billed at the time of delivery," Br. of Amicus Curiae, at 10, Shell bills the airlines for the fuel from its Chicago Administrative Complex in Oak Brook, Illinois, Stip. para. 20. Allied tenders copies of the meter tickets to the airlines and sends copies to Shell's administrative complex, but it is Shell that does the billing. *Id.* paras. 16, 20.

Billing and payment are, of course, integral parts of the sales transactions. The Supreme Court of Missouri has clearly stated that for purposes of local sales taxes, sales are not consummated until payment is made. *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282, 284 (Mo. 1978) (en banc). *See* Appellant's Reply to Appellee's Motion to Dismiss or Affirm, at 4 & n.3.

mated at the place of business of the retailer"[5] and (2) that if a seller "has more than one piece of business" in Missouri that "participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order" is taken. MO. REV. STAT. §§ 66.615.5, 94.620.5 (1978 & Cum. Supp. 1984). The United States discusses the second of these provisions. Br. of Amicus Curiae, at 13-14. Shell's argument, however, addresses more the discriminatory application of the first.

Shell contended below that, under the plain language of the first provision, it is not subject to sales taxation in St. Louis County because it has no place of business there.[6] The Supreme Court of Missouri held that the first statutory "place of business" presumption applies only if the sales "might have a nexus with more than one municipality," *id.*, and although it had clearly applied that presumption previously, *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282 (Mo. 1978) (en banc), it distinguished *Mobil-Teria* on the ground that in that case the only jurisdictions involved were "local." App. to Juris. Statement, at 5a. Hence by interpretation the Supreme Court of Missouri read into the first statutory "place of

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[5] Appellee's own regulations provide that this presumption is conclusive and operates "without regard to the location of point of passage of title" or the place of delivery. 12 C.S.R. 10-5.545 (1977) (App. to Juris. Statement, pp. 36a-37a). The Supreme Court of Missouri has held that the presumption is conclusive. *Fabick & Co.* v. *Schaffner*, 492 S.W.2d 737, 745 (Mo. 1973).

[6] It is stipulated that Shell has no facilities or employees in St. Louis County, or anywhere else in Missouri, that participate in either the *sale* or the *delivery* of the aviation fuel in question. Stip. para. 19. Indeed, nothing in the record indicates that Shell has any physical presence in St. Louis County at all.

business" presumption a discrimination not present in the language of the statute itself: The favorable conclusive presumption that the sales are consummated at the seller's place of business, without regard to the location of delivery or passage of title, applies only if the seller's place of business is in Missouri.[7]

As discussed above, it is clear that Shell has no place of business in St. Louis County related to the sales in question. It has no physical presence there. The asserted "agents," which the Supreme Court of Missouri did not identify but upon which it based its unexplained conclusion that Shell "maintains a continuing presence" at the Airport, *id.*, at 8a, could be nothing other than the unrelated companies responsible for delivery—the pipeline companies and Amoco, which owns the meter at the end of the pipeline.[8] Under this Court's decisions, however, where the asserted connection with the taxing jurisdiction exists solely through independent instrumentalities of delivery, there is effectively no nexus at all. *National*

[7] That the majority of the Supreme Court of Missouri considered this result may be inferred from the fact that the dissent specifically raised the point, arguing that the place of business presumption "serves to ease administration of both *intra*state and *inter*state . . . commerce transactions." App. to Juris. Statement, at 10a.

[8] The Missouri Administrative Hearing Commission originally sought to base a finding of a presence for Shell in St. Louis County upon the passage of the fuel through Amoco's fuel meter at the Airport end of the pipeline. *See* App. to Juris. Statement, at 24a. In an identical case involving Amoco, however, the Circuit Court of Cole County, Missouri, held that the same fuel meter did *not* constitute a place of business for Amoco itself, and thus Amoco was held not liable for the same taxes that Appellee now seeks to impose against Shell. *Amoco Oil Co.* v. *King*, No. CV184-661CC, slip op. at 7 (Mo. Cir. Ct. Cole County Dec. 18, 1984). Appellee did not appeal, and thus has acquiesced, in that decision.

Bellas Hess, 386 U.S., at 758; *Norton*, 340 U.S., at 539. *See Miller Brothers* v. *Maryland*, 347 U.S. 340 (1954). Hence the decision of the Supreme Court of Missouri at best is a misapplication of this Court's cases interpreting the nexus requirement. At worst, it creates in this case a discrimination against interstate commerce: Shell's place of business is entirely outside of Missouri, but Missouri nevertheless refuses to permit Shell the benefit of the conclusive statutory presumption that the sales are deemed consummated at the seller's place of business. Shell thus is required to pay St. Louis County sales and transportation sales taxes, even though it would not be required to do so if its place of business were within Missouri, but outside of St. Louis County.

C. This Court Should Note Probable Jurisdiction.

The United States' arguments are based upon a misinterpretation of the facts presented here. The position the United States advances, if adopted, would render intrastate those middleman-type transactions, such as Shell's in this case, that have heretofore always been considered interstate commerce. The questions presented are indeed substantial. This Court should note probable jurisdiction of Shell's appeal.

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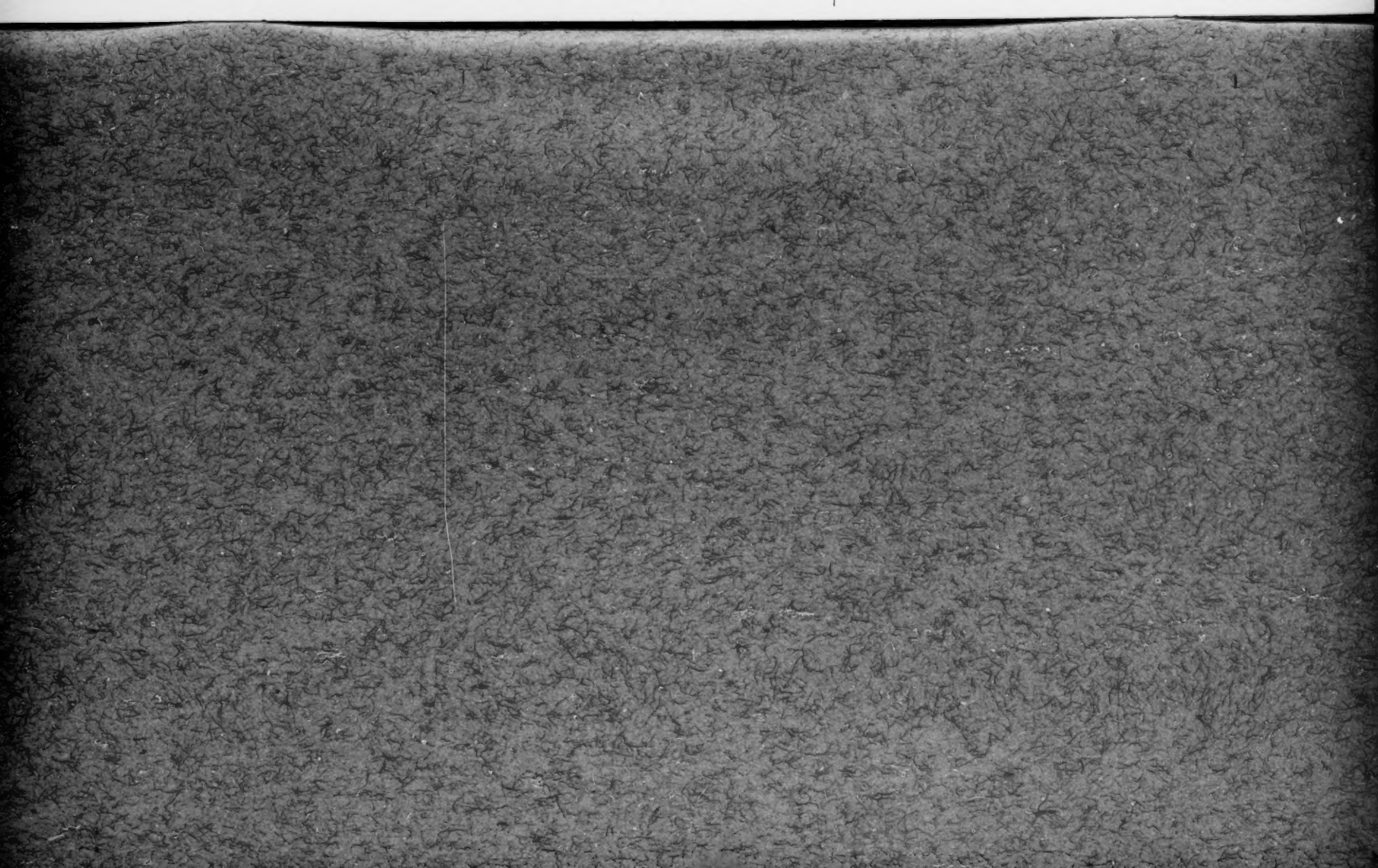

QUESTION PRESENTED

Whether the imposition of county sales taxes on appellant's sales of aviation fuel to various airlines at an airport within the county violated the Commerce Clause or the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-609

SHELL OIL COMPANY, APPELLANT

v.

DIRECTOR OF REVENUE OF MISSOURI

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant Shell Oil Company is a Delaware corporation with its principal business office in Houston, Texas. It has long been engaged in the business of marketing various petroleum products throughout most of the United States. For the period at issue in this case (1978-1981), appellant entered into contracts for the sale of aviation fuel to a number of airlines, some of which used Lambert-St. Louis International Airport in St. Louis County, Missouri. Each contract was executed by appellant in Houston and included an estimated annual

gallonage of fuel to be sold. Stip. paras. 1-4, 6; App., *infra,* 1a-2a.[1]

Appellant did not maintain, operate, or own any aviation fuel storage facility at the St. Louis County airport. Nor did it maintain anywhere in Missouri any administrative or sales office, store, warehouse, or similar facility that participated in the sale or delivery of aviation fuel to the airlines at that airport. Stip. paras. 15, 19; App., *infra,* 3a-4a. Rather, appellant sold the contracted-for fuel to the airlines through a series of fuel "exchange agreements" with Amoco Oil Company (Amoco). Those agreements, together with appellant's airline contracts, allowed appellant to sell and to deliver aviation fuel to the airlines at the airport via fuel facilities at the airport maintained by Allied Aviation Fueling Company of St. Louis, Inc. (Allied), and a pipeline from Amoco's refinery at Wood River, Illinois. Stip. paras. 5, 9; App., *infra,* 2a, 3a.

An airline's purchase of particular quantities of fuel from appellant began with Allied, a company with which appellant had no contractual relationship and in which appellant had no financial interest. Allied operated an aviation fuel storage and distribution system at the airport; it contracted with the airlines to render fueling services to them and was directly paid by them. Upon receiving instructions from the airlines, Allied employees decided when to request delivery of fuel, the quantity of fuel to be delivered, what airlines would receive particular deliveries, and when deliveries would begin and end. Stip. paras. 12, 13, 17; App., *infra,* 3a, 4a.

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[1] This case was submitted to the Administrative Hearing Commission of the State of Missouri on an agreed Stipulation of Facts (J.S. App. 14a). We include the Stipulation of Facts as an appendix to this brief.

The aviation fuel thus ordered through Allied was obtained from the Amoco refinery in Wood River, Illinois, and transported to airport storage tanks through a pipeline.[2] A meter owned by Amoco at the airport end of the pipeline was read by Allied employees, who recorded the quantity of fuel delivered into storage, tendered the meter ticket to the airline customer, and sent a copy to appellant's Chicago office, which then billed the airline purchasing the fuel. Stip. paras. 5, 9, 11, 12, 16, 20; App., *infra*, 2a, 3a, 4a. Pursuant to appellant's contracts with Amoco and with the airlines, appellant both obtained and transferred title to the fuel at the airport: as aviation fuel flowed through the meter at the airport and was delivered into storage, title to the fuel passed instantaneously from Amoco to appellant and then to the airline for which the fuel had been ordered. Stip. paras. 12-14, 17, 18; App., *infra*, 3a, 4a.

2. The State of Missouri has long imposed a statewide sales tax (at three percent from 1978 through 1979, and four percent thereafter) on the sale of tangible personal property at retail in the State. Mo. Ann. Stat. § 144.020.1(1) (Vernon 1976 & Supp. 1988).[3] The seller is primarily responsible for payment of the tax, but the seller is also generally directed to add the tax to the sale price to the purchaser (*id.* §§ 144.021, 144.080, 144.285). Ap-

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[2] The pipeline is owned by St. Louis Pipeline Company and operated by Amoco Pipeline Company, a wholly-owned subsidiary of Standard Oil Company (Indiana). Appellant has no equity or other ownership interest in St. Louis Pipeline Company, Amoco Pipeline Company, or Amoco. Stip. paras. 7, 8; App., *infra*, 2a.

[3] For purposes of the issues in this case, there is no material difference between the current versions of the relevant statutes and the versions in effect during the years at issue here. We therefore cite the current versions of the statutes.

pellee Director of Revenue collects the tax (*id.* § 32.028.1 (Vernon Supp. 1988)).[4]

Pursuant to Mo. Ann. Stat. § 66.600 (Vernon Supp. 1987), St. Louis County may add to the state sales tax a county-wide sales tax of its own, at a rate of one percent.[5] Pursuant to Mo. Ann. Stat. § 94.605 (Vernon Supp. 1987), St. Louis County (and the cities of St. Louis and Kansas City) may also impose a transportation sales tax of up to 1/2 percent. Both taxes may be imposed only on sales subject to the state sales tax and only in the manner of, and in accordance with the rules governing, that tax. *Id.* §§ 66.605, 66.610, 94.605, 94.610. St. Louis County adopted the authorized one percent supplemental sales tax in 1977. J.S. App. 36a (St. Louis County, Mo., Ordinance 8378 (Sept. 13, 1977)). It adopted the authorized transportation tax in 1973. J.S. App. 35a-36a (St. Louis County, Mo., Ordinance 6792 (June 28, 1973)).

Sections 66.615 and 94.620, Mo. Ann. Stat. (Vernon Supp. 1987), contain identical language concerning where

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[4] Missouri also imposes a use tax on certain goods, in the same amount as the sales tax; and it directs vendors who make sales of goods "for the purpose of storage, use or consumption in th[e] state," which is presumed from in-State delivery, to collect the use tax from purchasers of their goods. Mo. Ann. Stat. §§ 144.610, 144.615, 144.620, 144.635 (Vernon 1976 & Supp. 1988). As is common throughout the Nation, this "compensating" use tax (*id.* § 144.600) is designed chiefly to protect the sales tax. Accordingly, no use tax on goods must be paid by persons who have paid the (seller's) Missouri sales tax; and if a lower out-of-State sales or use tax has been paid, the Missouri use tax is due only for the excess of the Missouri tax over the out-of-State tax. *Id.* § 144.615.

[5] Other counties are authorized to impose supplemental sales taxes of 1/4, 3/8, or 1/2%. Mo. Ann. Stat. §§ 67.505 *et seq.* (Vernon Supp. 1987). Cities are authorized to impose supplemental sales taxes of 1/2, 7/8, or 1%. See *id.* §§ 94.500 *et seq.* (Vernon 1971 & Supp. 1987).

particular sales are deemed to occur for purposes of the two county taxes. With exceptions not relevant here, each provides that "all retail sales shall be deemed to be consummated at the place of business of the retailer." Each further provides: "In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing."

3. Appellant paid the statewide "sales or use taxes" for aviation fuel delivered at the airport and has not contested its liability for such taxes (Stip. para. 24; App., *infra,* 5a).[6] Appellant denied its liability for the two taxes imposed by St. Louis County on the same fuel transactions (*ibid.*). Appellee Director, taking the contrary view, assessed appellant for the two county taxes for the period from March 1, 1978, through February 28, 1981, in the aggregate amount of $103,009.53, including interest (Stip. paras. 21, 22; App., *infra,* 4a-5a).[7]

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[6] The stipulation does not specify whether the state tax paid was the sales tax or the use tax (see note 4, *supra*). As the Missouri Supreme Court observed (J.S. App. 3a), however, the Administrative Hearing Commission concluded that, because the sales took place in the State, the tax paid was a sales tax (J.S. App. 17a n.3). Appellant points out (Reply Br. 6 n.6) that it has always contended that the state tax it paid was the use tax and that it had no reason to challenge the contrary ruling because it would be liable in any event for the same amount.

[7] The stipulation gives numbers for the taxes and the interest for each of the two county taxes. The sum of those four figures is $103,009.53. The stipulation also gives a number for the sum of taxes and interest for the county sales tax and a number for the sum of taxes and interest for the county transportation sales tax. Those two figures add up to $104,009.53. The discrepancy results from the fact that the

Appellant appealed to the State Administrative Hearing Commission, which agreed with appellee's assessment (J.S. App. 14a-24a). After making findings based on the stipulated facts (*id.* at 15a-17a), the Commission concluded that appellant's contracts with the airlines were merely contracts for future sales (*id.* at 22a-23a), that the actual sales and transfers took place at the airport upon each airline's "request for service from Allied" (*id.* at 23a-24a), and that appellant accordingly had a "place of business" in the county, within the terms of Mo. Ann. Stat. §§ 66.615 and 94.620 (Vernon Supp. 1987) (J.S. App. 23a-24a). The Commission did not discuss appellant's constitutional challenge to the imposition of the county taxes.

A divided Supreme Court of Missouri affirmed (J.S. App. 1a-12a). After observing that the airport fuel sales were subject to the Missouri sales tax because title passed at the airport (*id.* at 4a-5a), the court rejected appellant's "principal contention"—that its sales were exempt under the "place of business" provisions, Mo. Ann. Stat. §§ 66.615, 94.620 (Vernon Supp. 1987), "because it [did] not maintain a place of business in St. Louis County" (J.S. App. 1a). The court ruled that the relied-on provisions, which state that "retail sales shall be consummated at the place of business of the retailer," apply only to transactions that might have a nexus with more than one state subdivision. They do not apply here, the court held, because "[t]hese sales [were] entirely consummated in St. Louis County where[] [appellant], through its agents, deliver[ed] the aviation fuel, and passe[d] title to the purchasers and ultimate users, the airlines with whom it has contracted." *Id.* at 5a.

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tax and interest figures for the transportation tax do not in fact add up to the figure given by the stipulation for their sum.

Based on the same view of the fuel sales, the court also rejected appellant's Commerce Clause and Due Process Clause challenges (J.S. App. 7a-8a). "Since this Court has found the sale[s] to be intrastate in character, this challenge evaporates. * * * The sale[s] themselves are inextricably linked to St. Louis County. Through its agent, [appellant] maintains a continuing presence at Lambert Field by which it fulfills its contracts with airlines which operate there." *Ibid.*[8] The dissenting judges concluded (*id.* at 9a-12a), to the contrary, that appellant's sales had an insufficient connection to Missouri.

DISCUSSION

Appellant contends in this Court that the Commerce Clause (J.S. 12-18), the Fourteenth Amendment Due Process Clause (*id.* at 20), and the Equal Protection Clause (*id.* at 21-22) prohibit imposition of the St. Louis County taxes on its sales of fuel to the Lambert Field airlines. As appellant recognizes (*id.* at 12), the Commerce Clause contention is governed by the standards summarized by this Court in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977): the taxed activity must have a nexus with the taxing State; the measure of the tax must be fairly related to the State's protections and services; the tax must be fairly apportioned so as to protect against multiple taxation; and the tax must not discriminate against interstate commerce. See, *e.g., Wardair Canada Inc.* v. *Florida Dep't of Revenue,* 477 U.S. 1, 8 (1986); *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 622-626 (1981). If,

[8] The court stated, "[appellant's] equal protection argument fails for similar reasons" (J.S. App. 8a). Because appellant made no equal protection argument (J.S. 11 n.7), this statement apparently refers to appellant's due process challenge.

as we will show, those standards are easily met in this case, appellant's other challenges fail as well; for, as appellant recognizes (J.S. 20), due process requirements are met here if Commerce Clause requirements are met (see, *e.g.*, *Exxon Corp.* v. *Department of Revenue,* 447 U.S. 207, 220, 227-228 (1980)), and appellant's equal protection argument (J.S. 21-22), which in any event appellant never raised in the state courts (*id.* at 11 n.7), is at best simply a version of the Commerce Clause discrimination argument.[9]

If we put temporarily to one side the question of discrimination, this Court's decisions on state sales taxes (*i.e.*, taxes on sellers imposed on sales and measured by sale price) make clear that the nexus, fair relationship, and fair apportionment requirements of the four-part *Complete Auto* test are satisfied if enough significant aspects of the taxed sales are connected with the taxing State that the sales may be said to take place in that State, so that no other State may tax those sales. See *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue,* No. 85-1963 (June 23, 1987), slip op. 18 (only one State may tax sale). Although it would be consistent with this Court's decisions to identify the place of passage of title, or ownership, as the single determinative factor that fixes the location for a particular sale (see U.C.C. § 2-106(1) ("sale" is "the passing of title from the seller to the buyer")), this Court has not yet found it necessary, in this relatively uncontrover-

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[9] To the extent appellant suggests that Missouri has deprived it of equal protection by discriminating on the basis of residence or State of incorporation (J.S. 21-22, citing *Williams* v. *Vermont,* 472 U.S. 14 (1985)), the premise of the suggestion is wrong: the alleged discrimination attacked by appellant (see J.S. 16-18, 21-22) turns on the location of a particular activity (taking orders for sales), not on a taxpayer's residence or State of incorporation.

sial area, to adopt such a test. Rather, the Court's decisions have focused on several aspects of sales— principally, order taking, delivery, and title passage—without expressly indicating whether one aspect might be determinative. See *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965) (sales tax invalid where invitations for bids, submission of bids, delivery, and passage of title all occurred out-of-State); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951) (state sales tax valid as applied to sales having some relation to in-State retail outlets, but invalid where in-State customers sent orders to an out-of-State office, which shipped goods directly to the customer, with no involvement of the in-State retail outlet); *McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944) (sales tax invalid where orders were accepted and title was passed, upon delivery to carrier, out-of-State: seller was "through selling" before goods reached taxing State); *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940) (sales tax valid where "seller completed his sales" (*McLeod,* 322 U.S. at 330) in the taxing State—order taking, sales office, and delivery all were in the taxing State); *Wiloil Corp.* v. *Pennsylvania,* 294 U.S. 169 (1935) (sales tax valid where orders taken and delivery made in taxing State, even though seller obtained goods out-of-State); *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506 (1923) (same); *Wagner* v. *City of Covington,* 251 U.S. 95 (1919) (sales tax valid where soft-drink seller from out-of-State came to State with loaded truck and took orders and delivered goods in the taxing State).

This is a straightforward case, for, as the Missouri Supreme Court concluded (J.S. App. 5a), the record indicates that all of the relevant aspects of the sale occurred at the airport in the State. First, as the parties' stipulation expressly states, title to the aviation fuel was passed from

appellant to the airlines at the airport; indeed, appellant itself did not own the fuel sold to the airlines until the fuel was present in Missouri. Stip. para. 18; App., *infra,* 4a. Second, appellant, through its contractual arrangements with Amoco and the airlines, delivered the fuel to the airlines' agent (Allied) at the Missouri airport. Stip. para. 5; App., *infra,* 2a (arrangements allow appellant to "deliver aviation fuel at the airport"). Third, although appellant's Texas office had executed "estimated annual gallonage" contracts for future sales (Stip. paras. 3, 4; App., *infra,* 2a), orders for particular quantities of fuel (billed at the time of delivery) were placed by the airlines through Allied's employees, presumably at the airport, who passed on the orders and controlled the deliveries. Stip. para. 17; App., *infra,* 4a. In these circumstances, it is not surprising that the parties' stipulation expressly states that appellant's arrangements allowed it "to sell * * * aviation fuel at the airport" (Stip. para. 5; App., *infra,* 2a), and there can be no doubt that Missouri, and hence St. Louis County, may constitutionally tax the sales at issue.

That the fuel was obtained by appellant from an out-of-State supplier (Amoco's Illinois refinery) is irrelevant, because it does not alter the fact that appellant's sales to the airlines took place at the airport. See *Wiloil Corp.* v. *Pennsylvania, supra; Sonneborn Bros.* v. *Cureton, supra;* cf. *J. Bacon & Sons* v. *Martin,* 305 U.S. 380 (1939) (tax on post-sale "receipt" in State valid). Nor is it relevant that the aviation fuel arrived at the airport by a pipeline operated by someone other than appellant. See *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 653 (1942) ("sale of gas at the burner tips by one who pipes the gas into the state or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to state taxation"). Nor, contrary to appellant's protests (J.S. 13-14),

can it matter that the Missouri Supreme Court referred to appellant's use of "agents" in the airport sales (J.S. App. 5a, 7a, 8a): whatever the terminology, the fact remains that appellant had a series of contractual arrangements that enabled it to respond to airline customer orders and to obtain, to deliver, and to transfer title to aviation fuel at the Missouri airport.

Appellant suggests (J.S. 15-16) that other States—*i.e.*, Texas and Illinois—could "conceivably" tax the same sales of aviation fuel that Missouri taxes. But no other State has tried or is likely to try to tax those sales, since it is clear that no sale by appellant occurred either in Texas, where only contracts for future sales were executed, or in Illinois, where Amoco but not appellant owned and possessed the fuel.[10] In any event, for precisely the same reasons that Missouri may tax the sales, no other State could validly do so.

The two decisions on which appellant principally relies (J.S. 14-15, 19-20), *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753 (1967), and *Norton Co.* v. *Department of Revenue, supra,* involve entirely different facts from those presented here. In both cases, in-State purchasers sent orders out-of-State for goods that the purchaser knew would come from the seller's out-of-State stock. In this case, as far as the record indicates, the airlines placed their orders for fuel at the airport, without

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[10] See also Tex. Tax Code Ann. § 151.005 (Vernon 1982 & Supp. 1988) (defining "sale" for sales-tax purposes, as relevant here, to mean transfer of title or possession); Tex. Bus. & Com. Code Ann. § 2.106(a) (Vernon 1968) (adopting U.C.C. § 2-106(1) title-passage definition of "sale"); Ill. Ann. Stat. ch. 120, para. 440 (Smith-Hurd 1974 & Supp. 1987) (defining "sale at retail" for purposes of retailer's occupation tax, as relevant here, to mean transfer of ownership or title); Ill. Ann. Stat. ch. 26, para. 2-106(1) (Smith-Hurd 1963) (adopting U.C.C. § 2-106(1)).

regard to the source of the fuel that would fill the orders. Moreover, in neither *National Bellas* nor *Norton* is there any suggestion that title to the shipped goods was passed to the purchaser within the taxing State.[11] Here, it is undisputed that title to the fuel passed in Missouri. And, indeed, in this case, unlike *National Bellas* and *Norton,* the goods sold did not in fact come from the seller's out-of-State stock: the seller never even owned the goods being sold before those goods arrived in the taxing State. Unlike the sellers in *National Bellas* and *Norton,* appellant could not conceivably be described as an out-of-State seller.[12]

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[11] Under U.C.C. § 2-401(1), if a contract merely requires the seller to send goods to the buyer, title passes at the time and place of shipment, not upon later delivery to the buyer. See J.S. App. 4a (quoting Missouri version of that provision).

[12] *National Bellas,* like *Miller Bros.* v. *Maryland,* 347 U.S. 340 (1954), which appellant also cites (J.S. 14), actually involved a use tax rather than a sales tax. Here, the county taxes at issue are sales taxes; and unlike Missouri's statewide sales tax, they are not even accompanied by a "protective" use tax. If the county taxes were use taxes, however, or if the constitutional standards applicable to use taxes applied here, appellant would clearly have no constitutional complaint.

This Court in *National Geographic Soc'y* v. *California Bd. of Equalization,* 430 U.S. 551, 560-561 (1977), ruled that, when a State compels a seller to collect, at the time of sale, a use tax imposed on in-State users, the constitutional nexus requirement focuses on the connection of the *seller* to the State, not of particular sales to the State. In this case, nothing in the record suggests, what is certainly unlikely, that appellant did not have substantial operations in Missouri in 1978-1981, albeit unrelated to these aviation-fuel sales. If appellant had such a presence, which the sellers in *National Bellas* and *Miller Bros.* did not, *National Geographic* makes clear that Missouri and St. Louis County could insist that appellant collect a use tax on aviation fuel. See also *General Trading Co.* v. *State Tax Comm'n,* 322 U.S. 335 (1944); *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359 (1941). Indeed, the validity of such a requirement would follow from appellant's concession that it is liable for the statewide use tax, because, as the dissent in the Missouri Supreme Court recognized (J.S. App. 12a), it is nexus

If, as we have shown, the fact that all relevant aspects of the fuel sales occurred at the airport answers appellant's arguments with respect to the first three components of the *Complete Auto* test, that fact also disposes of appellant's argument with respect to the discrimination component of the *Complete Auto* test. The Missouri provisions that govern the county taxes at issue (Mo. Ann. Stat. §§ 66.615, 94.620 (Vernon Supp. 1987)) state that, when "a retailer has more than one place of business in this state which participates in the sale," the sale is deemed to take place where the initial order is taken. Appellant contends (J.S. 21-22) that that provision discriminates against interstate commerce because a retailer that delivered and passed title to aviation fuel at the airport would not incur the county taxes if it utilized a separate order-taking office in another county in Missouri (perhaps with a lower county sales-tax rate), whereas a retailer that delivered and passed title to aviation fuel at the airport would incur the county taxes if it utilized a separate order-taking office outside the State. The second part of this comparison, however, is hardly clear under Missouri law and, in any event, has no application to appellant. The Missouri Supreme Court had no occasion to decide where a sale would be located for purposes of the county taxes if appellant had an out-of-State office that took orders for fuel sales. There is no basis for questioning the state court's

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to the State, not to any particular county, that should matter for Commerce Clause purposes. See *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 713 (1985); *Town of Lockport* v. *Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 269 (1977); *Railroad Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5, 37 (1873); *Peterman* v. *Coleman*, 764 F. 2d 1416, 1422 (11th Cir. 1985); cf. *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Wagner* v. *City of Covington*, 251 U.S. 95 (1919).

conclusion (J.S. App. 5a, 7a-8a) that all aspects of appellant's sales, including the taking of orders for fuel sales, took place within Missouri.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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MARCH 1988

APPENDIX

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

Case No. RS-82-0105

SHELL OIL COMPANY, PETITIONER

VS

DIRECTOR OF REVENUE STATE OF MISSOURI
TRUMAN STATE OFFICE BUILDING
P.O. BOX 475
JEFFERSON CITY, MISSOURI 65105
RESPONDENT

STIPULATION OF FACTS

Comes now Petitioner, Shell Oil Company, and Respondent, Director of Revenue, by and through their attorneys, who make and enter into the following Stipulation of Facts and agree that they may supplement by competent evidence anything herein which may require supplementation, not inconsistent with the statements, matters and facts agreed to herein and provided further that at any stage of the case any party shall have the right to challenge the legal conclusions to be drawn from any such statement, matter or fact.

1. Shell Oil Company (hereinafter "Shell") is a Delaware corporation with its principal business office at One Shell Plaza, P.O. Box 2463, Houston, Texas 77001.

2. Shell is engaged in the business of, *inter alia*, marketing various petroleum products, including aviation fuel, through out most of the United States.

3. Shell has entered into contracts for the sale of aviation fuel with the following airlines arriving at and departing out of Lambert-St. Louis International Airport: Capital Air, Delta Air Lines, Inc., Republic Airlines, Inc., Garude Indonesian Airways, P.T. Mississippi Valley Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Southern Air Transport, Inc., Transamerica Airlines, Trans International Airlines, United Air Lines, Inc., World Airways, Inc., and Zantop International Airlines, Inc. Such contracts were accepted and executed by Shell at its Houston, Texas, office.

4. Such contracts entered into between Shell and the respective airlines included an estimated annual gallonage of aviation fuel to be sold to the respective airline by Shell.

5. Shell has certain fuel "exchange agreements" with Amoco Oil Company which allow Shell to sell and deliver aviation fuel at the airport via pipeline from the Amoco Oil Company refinery at Wood River, Illinois. These exchange agreements are accepted either by Amoco at its Chicago, Illinois, office or Shell at its Houston, Texas, office.

6. Lambert-St. Louis International Airport (hereinafter "the Airport") is located in St. Louis County, Missouri.

7. The aviation fuel sold by Shell to the respective airlines is transported from the Amoco Oil Company refinery at Wood River, Illinois, to the Airport through a pipeline owned by St. Louis Pipeline Company and operated by Amoco Pipeline Company, a wholly-owned subsidiary of Standard Oil Company (Indiana).

8. Shell has no equity or other ownership interest of any kind in St. Louis Pipeline Company, Amoco Pipeline Company or Amoco Oil Company.

9. The fuel is metered through a meter owned by Amoco Oil Company at the Airport adjacent to fuel receiving facilities of Allied Aviation Fueling Company of St. Louis, Inc. (hereinafter "Allied Aviation"). This meter is utilized in measuring the fuel transported via the pipeline from Wood River to the facilities of Allied Aviation at the Airport. This metering device at the Airport is "read" by employees of Allied Aviation.

10. A similar metering device owned by Amoco Oil Company at Wood River measures the aviation fuel pumped from Wood River through the pipeline to Allied Aviation's facilities at the Airport. Thus, such fuel is measured when it enteres [*sic*] the pipeline in Illinois and when it leaves the pipeline at the Airport in Missouri.

11. The aviation fuel transported by pipeline from Wood River to the Airport is delivered into storage tanks maintained and operated by Allied Aviation.

12. Allied Aviation operates an aviation fuel storage tank and distribution system at the Airport and, pursuant to contracts with the airlines, renders a fueling service to the airlines operating into and out of the Airport. The airlines compensate Allied Aviation directly for the services rendered to the airlines. Shell makes no remuneration of any kind to Allied Aviation.

13. Shell has no economic or proprietary interest of any kind in Allied Aviation nor does it have any contractual relationship whatsoever with Allied Aviation.

14. The fuel distribution and storage system at the Airport, operated by Allied Aviation, receives shipments of aviation fuel from suppliers other than Shell.

15. Shell does not maintain, operate or own any aviation fuel storage facilities at the Airport.

16. When Allied Aviation records the quantity of fuel delivered into storage, the meter ticket is tendered to the

airlines customer and a copy is sent to Shell at its Chicago Administrative Complex located in Oak Brook, Illinois.

17. The entire operation involving the delivery of aviation fuel from Illinois to Allied Aviation's facilities at the Airport is controlled by employees at Allied Aviation. Allied Aviation's employees, pursuant to instructions from the respective airlines, decide when to request delivery of fuel, the quantity to be delivered, to which airline such fuel is to be delivered, and control the commencement and termination of such deliveries.

18. As a result of the fuel "exchange agrements" [*sic*] between Shell and Amoco Oil Company, and the contracts with the airlines, title to the aviation fuel pumped to Allied Aviation's facilities at the Airport passes simultaneously from Amoco to Shell and then to the respective airline when the aviation fuel flows through Amoco's metering device at the Airport and is delivered into storage.

19. Shell maintains no sales office, administrative office, store, warehouse or other similar facility at the Airport, or anywhere else in the State of Missouri, which in any way participates in the sale or delivery of the aviation fuel in question to the respective airlines at the Airport.

20. The airlines purchasing fuel from Shell are billed by Shell's Chicago Administrative Complex in Oak Brook, Illinois.

21. Shell was assessed for St. Louis County Transportation Sales Tax and St. Louis County Sales Tax allegedly due for the period from March 1, 1978 through February 28, 1981, based solely on the sale of aviation fuel delivered through the pipeline as described above.

22. The assessment for the St. Louis County Sales Tax totaled $68,673.02, composed of Tax in the amount of $52,077.96 with interest thereon of $16,595.06. The assessment for the St. Louis County Transportation Sales Tax

totaled $35,336.51, composed of tax in the amount of $26,038.98 with interest thereon of $8,297.53.

23. During all time periods herein, the St. Louis County Sales Tax and St. Louis County Transportation Sales Tax were in effect and applicable to retail sales pursuant to Chapters 66 and 94, RSMo.

24. Shell has paid and no controversy exists with respect to State sales or use taxes on the sales in question, however, Shell denies that it is liable for such St. Louis County Sales Tax and St. Louis County Transportation Sales Tax and interest thereon.

25. It is hereby agreed that the foregoing Stipulation of Facts are made for the purpose of establishing certain facts only in connection with the above styled cause, Case No. RS-82-0105 and may not be used in any other case or proceeding except cases or proceedings involving Case No. RS-82-0105.

26. The facts stipulated herein existed and were true at all times during the period March 1, 1978 through February 28, 1981.

Executed this 9th day of July, 1984.

By /s/ David C. Agee

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